Docket for 02-1343

No. 02-1343 Status: ARGUED
Title: Engine Manufacturers Association and Western States Petroleum Association, Petitioners
v.
South Coast Air Quality Management District, et al.
Docketed: March 14, 2003
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (01-56688)
Decision Date: October 24, 2002
Rehearing Denied: December 11, 2002

| ~~Date~~ | ~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~ |
|---|---|
| Mar 11 2003 | Petition for writ of certiorari filed. (Response due April 14, 2003) |
| Apr 11 2003 | Brief amici curiae of Alliance of Automobile Manufacturers, Inc., et al. filed. |
| Apr 14 2003 | Brief amici curiae of American Trucking Association, et al. filed. |
| Apr 14 2003 | Brief of respondents South Coast Air Quality in opposition filed. |
| Apr 23 2003 | Reply of petitioners Engine Manufacturers Assoc. filed. |
| Jun 9 2003 | Petition GRANTED. |
| Jun 20 2003 | Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner Engine Manufacturers Assn. |
| Jun 20 2003 | Consent to the filing of amicus briefs in support of either party received from counsel for the respondent South Coast Air Quality |
| Jun 23 2003 | Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner Western States Petroleum Assn. |
| Jun 25 2003 | Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including August 22, 2003. |
| Jun 25 2003 | 30 day extension ot time for respondents to file the brief on the merits. (Due November 3, 2003) |
| Jun 25 2003 | Consent to the filing of amicus briefs in support of either party received from counsel for the respondents Natural Resources Defense Council, et al.. |
| Aug 14 2003 | Further extension of time within which to file the join appendix and petitioner's brief on the merits to and including August 29, 2003. |
| Aug 29 2003 | Joint appendix filed. |
| Aug 29 2003 | Brief of petitioners Engine Manufacturers Association, et al. filed. |
| Aug 29 2003 | Brief amicus curiae of Chamber of Commerce of the United States of America filed. |
| Aug 29 2003 | Brief amici curiae of Alliance of Automobile Manufacturers, et al. filed. |
| Aug 29 2003 | Brief amici curiae of American Road & Transportation Builders Association, et al. filed. |
| Aug 29 2003 | Brief amicus curiae of the United States filed. |
| Aug 29 2003 | Brief amici curiae of American Automotive Leasing Association and National Association of Fleet Administrators, Inc. filed. |
| Nov 3 2003 | SET FOR ARGUMENT Wednesday, January 14, 2004. |
| Nov 4 2003 | CIRCULATED. |
| Nov 9 2003 | Record received from the U.S.D.C. for the Central District of California. (2 boxes) |
| Nov 9 2003 | Record received from the U.S.C.A. for the 9th Circuit. (1 box) |

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| Nov 17 2003 | Brief of respondent South Coast Air Quality Management District filed. (Distributed) |
| Nov 17 2003 | Brief of respondents Natural Resources Defense Council, Inc., et al. filed. (Distributed) |
| Nov 17 2003 | Brief of respondents Natural Resources Defense Council, Inc., et al. filed. (Distributed) |
| Nov 17 2003 | Brief of respondent South Coast Air Quality Management District filed. (Distributed) |
| Nov 17 2003 | Brief amici curiae of National League of Cities, et al. filed. (Distributed) |
| Nov 17 2003 | Brief amici curiae of American Academy of Pediatrics (California District), et al. filed. (Distributed) |
| Nov 17 2003 | Brief amicus curiae of Sunline Transit Agency filed. (Distributed) |
| Nov 17 2003 | Brief amici curiae of Natural Gas Vehicle Coalition, and California Natural Gas Vehicle Coalition filed. (Distributed) |
| Nov 17 2003 | Brief amici curiae of California, et al. filed. (Distributed) |
| Nov 18 2003 | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. |
| Dec 15 2003 | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. |
| Dec 22 2003 | Reply of petitioners Engine Manufacturers Association and Western States Petroleum Association filed. (Distributed) |
| Jan 14 2004 | Argued. For petitioners: Carter G. Phillips, Washington, D.C.; and on behalf of the United States, as amicus curiae, Theodore B. Olson, Solicitor General, Department of Justice, Washington, D.C. For respondents: Seth P. Waxman, Washington, D.C. |

Supreme Court, U.S.
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No. 02-

IN THE

# Supreme Court of the United States

ENGINE MANUFACTURERS ASSOCIATION AND
WESTERN STATES PETROLEUM ASSOCIATION,
*Petitioners*,

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, *et al.*,
*Respondents*.

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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75 pp

## QUESTION PRESENTED

Section 209(a) of the Clean Air Act expressly preempts any state or local "standard relating to the control of emissions from new motor vehicles." 42 U.S.C. § 7543(a). The First and Second Circuits have applied this provision to invalidate state regulations limiting the sale of new motor vehicles with specified emission characteristics. The Ninth Circuit in this case has held that a local regulation may impose such restrictions on new vehicle purchases. The question presented is:

Whether local government regulations prohibiting the purchase of new motor vehicles with specified emission characteristics—which are otherwise approved for sale by state and federal regulators—are preempted by the Clean Air Act, 42 U.S.C. § 7401 *et seq.*

## PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner Engine Manufacturers Association ("EMA") was plaintiff and appellant below. Respondents South Coast Air Quality Management District, its individual Board Members (William A. Burke, Norma J. Glover, Michael D. Antonovich, Hal Bernson, Jane W. Carney, Cynthia P. Coad, Beatrice J.S. Lapisto-Kirtley, Ronald O. Loveridge, Jon D. Mikels, Leonard Paulitz, Cynthia Verdugo-Peralta, and S. Roy Wilson), and its Executive Officer (Barry R. Wallerstein) were defendants and appellees below.

Petitioner Western States Petroleum Association ("WSPA") intervened below on behalf of plaintiff EMA, and also joined in EMA's appeal to the Ninth Circuit. The Natural Resources Defense Council, Coalition for Clean Air, Communities for a Better Environment, Inc., Planning & Conservation League, and Sierra Club intervened on behalf of defendants.

Pursuant to S. Ct. Rule 29.6, petitioner EMA states that it is the not-for-profit trade association representing the interests of the world's leading manufacturers of internal combustion engines used in almost all medium-duty and heavy-duty motor vehicles, other than passenger cars. EMA members manufacture the medium-duty and heavy-duty compression-ignition, diesel-fueled engines that are installed in certain pick-up trucks and sport-utility vehicles, delivery vans, shuttle vans and cargo vehicles, trucks, tractor-trailers, waste haulers, street-sweepers and buses, and sold throughout the United States. EMA has no corporate parents, subsidiaries or affiliates, and no publicly traded company has a 10% or greater ownership interest in EMA.



Petitioner WSPA is a trade association organized as a non-profit corporation under California law. Its members consist of companies engaged in the exploration, production, transportation, refining and marketing of crude oil and petroleum products, including diesel fuel. WSPA has no corporate parents, subsidiaries or affiliates, and no publicly traded company has a 10% or greater ownership interest in WSPA.

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ENGINE MANUFACTURERS ASSOCIATION AND
WESTERN STATES PETROLEUM ASSOCIATION,
*Petitioners*,

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, *et al.*,
*Respondents*.

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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The Engine Manufacturers Association ("EMA") and the Western States Petroleum Association ("WSPA") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The opinion of the Ninth Circuit affirming the District Court's judgment is reported at 309 F.3d 550 and reprinted in the appendix hereto ("App.") at 1a. The opinion of the District Court granting judgment for defendants is reported at 158 F.Supp.2d 1107 and is reprinted at App. 3a-27a.

## JURISDICTION

The judgment of the Court of Appeals was entered on October 24, 2002. A timely petition for rehearing was denied on December 11, 2002. App. 29a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. [U.S. Const., art. VI, cl. 2.]

Section 209(a) of the federal Clean Air Act, 42 U.S.C. § 7543(a), an express preemption provision, provides in pertinent part:

> No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

## INTRODUCTION

This case presents the question whether a local air quality district's "Fleet Rules," which prohibit operators of a fleet of fifteen or more vehicles from purchasing new diesel-fueled vehicles, constitute "standards relating to the control of emissions," and are thus preempted under the Clean Air Act.



It is also one of the unusual cases in which all the customary criteria for certiorari are readily met.

*First*, the Ninth Circuit's decision conflicts with the decisions of two other federal circuit courts that have considered the same issue. S. Ct. Rule 10(a). Both the First and Second Circuits have squarely held that regulations requiring that a percentage of vehicles *sold* be zero-emission vehicles established emissions "standards" and thus were preempted by the Clean Air Act. *Association of Int'l Auto. Mfrs.* v. *Commissioner, Massachusetts Dep't of Envtl. Protection*, 208 F.2d 1, 7 (1st Cir. 2000); *American Auto. Mfrs. Ass'n* v. *Cahill*, 152 F.3d 196, 200 (2d Cir. 1998). The Ninth Circuit, on the other hand, held that the Fleet Rules did not impose emissions "standards," and thus were not preempted, because the Fleet Rules spoke in terms of "purchases," not "sales." That semantic distinction does not and cannot explain away the stark conflict that now exists between the First and Second Circuits and the Ninth Circuit.

*Second*, the Court of Appeals's decision flatly conflicts with the decisions of this Court. S. Ct. Rule 10(c). This Court observed over three decades ago that Congress in the Clean Air Act "largely preempted the field with regard to 'emissions from new motor vehicles.'" *Washington* v. *General Motors Corp.*, 406 U.S. 109, 114 (1972). And as this Court has recognized in other contexts, the language chosen by Congress in preempting standards "relating to the control of emissions from new motor vehicles" is deliberately broad. *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383-384 (1992) ("related to" preemption is "broad" and "expansive"). Preemption under a "related to" clause typically covers all state laws having "reference to" or "connection with" the preempted subject matter. *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 223 (1995).

This Court's precedents concerning the preemptive force of the Clean Air Act and the expansive nature of its "relating

to" language compel the conclusion that the Act's preemption provisions encompass and prohibit the Fleet Rules here at issue. The Fleet Rules refer to and adopt a subset of standards and other preconditions in an effort to control the level of emissions from new motor vehicles. Indeed, obtaining reductions from new vehicle emissions is the very purpose of the Fleet Rules. The Fleet Rules seek to do so by mandating the purchase of new vehicles meeting the District's designated subset of "standards," and by prohibiting the purchase of diesel-fueled vehicles that can be purchased throughout California and the nation as a whole. Thus, pursuant to this Court's prior decisions, the Fleet Rules clearly "relate to" the control of emissions from new motor vehicles, and so are expressly preempted under the Clean Air Act.

*Third*, the conflict in this case concerns a matter of overriding national importance. S. Ct. Rule 10(c). Congress included an express preemption provision in the Clean Air Act to ensure uniformity in regulating new motor vehicle emissions. But the Ninth Circuit's decision allows local governments to impose varying and conflicting emissions standards on the purchase of new vehicles, balkanizing emissions standards across the country, undermining the regulatory authority of the U.S. Environmental Protection Agency ("EPA"), and thus negating plainly stated congressional intent. The court's decision should not be allowed to stand.



## STATEMENT OF THE CASE

### A. The Clean Air Act.

The Clean Air Act, 42 U.S.C §§ 7401-7671, "is one of the most comprehensive pieces of legislation in our nation's history." *Motor Vehicle Mfrs. Ass'n* v. *New York State Dep't of Envtl. Conservation* ("*MVMA*"), 17 F.3d 521, 524 (2d Cir. 1994). Title I of the Clean Air Act directs the U.S. Environmental Protection Agency ("EPA") to establish national ambient air quality standards ("NAAQS") for pollutants that cause or contribute to air pollution. 42 U.S.C. § 7408(a). To achieve and maintain those NAAQS, each state is required to submit a state implementation plan ("SIP") to EPA for approval. The SIP details the emission control regulations applicable to stationary sources within its jurisdiction that the state will utilize to ensure compliance with the NAAQS.

However, in their attempts to attain the NAAQS determined by EPA, states may not promulgate standards or other pre-approval requirements "relating to the control of emissions from new motor vehicles." 42 U.S.C. § 7543. As the District Court noted in this case,

> Section 209(a) [of the Clean Air Act] expressly preempts all state regulation of motor vehicle emissions. Congress preempted the field of vehicle emissions for two reasons: "to ensure uniformity throughout the nation, and to avoid the undue burden on motor vehicle manufacturers which would result from different standards." [App. 7a (quoting *Motor Vehicle Mfrs. Ass'n.* v. *New York State Dep't of Envtl. Conservation,* 810 F. Supp. 1331, 1337 (N.D.N.Y. 1993), *aff'd in part, rev'd in part,* 17 F.3d 521 (2d Cir. 1994))].

Title II of the Clean Air Act reflects Congress's "endeavor to resolve the problems caused by moveable sources or vehicle emissions," as distinguished from stationary sources of air pollution such as factories and power plants. App. 11a.

Section 202 of the Clean Air Act, 42 U.S.C. § 7543(a), expressly authorizes EPA to promulgate emission standards for new motor vehicles sold in the United States. Further, "[u]nder Section 209 of the Clean Air Act, exclusive control over 'standards relating to the control of emissions from new motor vehicles' is vested in the federal government, and the states are preempted from regulating in the area." *Cahill*, 152 F.3d at 198.

"In contrast to federally encouraged state control over stationary sources, regulation of motor vehicle emissions had been a principally federal project." *Engine Mfrs. Ass'n* v. *EPA*, 88 F.3d 1075, 1079 (D.C. Cir. 1996). Thus, the "cornerstone of Title II is Congress' continued express preemption of state regulation of automobile emissions." *MVMA*, 17 F.3d at 526. Only the State of California, due to its unique air quality problems, received a statutory exemption from the Clean Air Act's broad federal preemption, which permitted that State and that State alone to adopt its own new motor vehicle emission regulations. 42 U.S.C. § 7543(b)(1). Even so, California may adopt and enforce its own emission standards only after applying to and receiving a preemption waiver from EPA. *Id.* § 7543(b).

Other states may promulgate regulations requiring new vehicles sold in their states to be in compliance with California's emission standards, thereby "piggy-backing" onto California's preemption exemption. However, this opt-in provision, set forth in section 177 of the Clean Air Act, 42 U.S.C. § 7507, "is carefully drafted to avoid placing 'an undue burden on the automobile manufacturing industry.' " App. 12a (quoting *MVMA*, 17 F.3d at 527). Specifically, an opt-in state must adopt standards "identical" to California's.

### B. California's Regulations

Pursuant to its authority to adopt its own new motor vehicle emission regulations, California, acting through its Air Resources Board ("CARB"), has enacted two stringent



emission control programs for new motor vehicles: one for passenger cars and medium-duty vehicles, including certain diesel-fueled vehicles (the "LEV Program"), and one for heavy-duty urban transit buses (the "Urban Bus Program").

In adopting the LEV Program, "CARB established the most stringent exhaust regulations ever for light and medium duty vehicles." App. 13a. The regulations establish four tiers of exhaust emission standards for increasingly stringent categories of low-emission vehicles: (1) transitional low-emission vehicles ("TLEVs") (2) low-emission vehicles ("LEVs"); (3) ultra-low-emission vehicles ("ULEVs"); and (4) zero-emission vehicles ("ZEVs"). For each category of vehicles, a set of stringent emission standards for carbon monoxide, oxides of nitrogen and formaldehyde applies. "The LEV Program achieves emission reductions by requiring manufacturers to sell progressively cleaner mixes of vehicles over time. The average emissions from the mix of these categories of vehicles produced by a manufacturer must meet an [increasingly lower] overall 'fleet average' [emission] requirement." App. 14a.

CARB's Urban Bus Program: (i) requires reductions in particulate matter and oxides of nitrogen fleet emissions by urban transit bus operators; and (ii) establishes stringent exhaust emission standards applicable to new urban bus engines. To implement the CARB Urban Bus Program, urban transit bus fleet operators are required to choose between two different compliance paths: (i) a diesel path, or (ii) an alternative fuel (*i.e.*, natural gas) path.

Accordingly, under the CARB Urban Bus Program, as under the LEV Program, new CARB-certified diesel-fueled vehicles may continue to be bought and sold throughout California. The Fleet Rules, by contrast, prohibit fleet operators from purchasing CARB-certified diesel-fueled motor vehicles.

## C. The SCAQMD Fleet Rules.

The Fleet Rules at issue in this case were promulgated in 2000 by the South Coast Air Quality Management District (the "SCAQMD" or "District"), a political subdivision of the State of California encompassing the greater Los Angeles metropolitan area. The Fleet Rules apply to various categories of operators of public and private fleets of motor vehicles, including transit buses, airport shuttles, limousines, taxis, street-sweepers, waste haulers, and other heavy-duty trucks. App. 15a-19a.

As to each category, the Fleet Rules prescribe that when any covered fleet operator within the District purchases or replaces its vehicles it must, in the words of the District Court, "acquire only those specific motor vehicles that the SCAQMD has designated as meeting *its standards* and requirements." App. 16a (emphasis added). Specifically, the Rules require fleet operators to procure only the types of low-emission gasoline vehicles (LEVs or ULEVs) or alternative-fuel vehicles designated by the SCAQMD, which constitute just a limited "subset" of the types of vehicles certified by CARB as meeting the State's new motor vehicle emission standards. The Fleet Rules also expressly prohibit the purchase of new vehicles equipped with CARB-certified diesel-fueled engines.[1]

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[1] For example, Fleet Rules 1191 and 1194 require fleet operators of passenger cars, light-duty trucks, medium-duty vehicles, airport shuttles, limousines and taxis to acquire only LEVs, ULEVs or alternative-fueled vehicles when procuring or leasing those types of vehicles in the District. Fleet Rule 1192 requires public transit bus fleet operators to acquire only alternative-fuel heavy-duty vehicles. Diesel-fueled transit buses, which are allowed under the CARB Urban Bus Program, are prohibited. Fleet Rules 1193, 1186.1 and 1196 apply to fleets of garbage trucks, street-sweepers and other heavy-duty trucks, and mandate the purchase or leasing of only alternative-fuel vehicles. The purchase of CARB-certified diesel-fueled vehicles—lawful for purchase elsewhere in the State—is expressly prohibited. *See* App. 15a-19a.



## D. Proceedings Below.

EMA, later joined by the Western States Petroleum Association, brought suit in the District Court to enjoin the Fleet Rules, contending that the rules were preempted by the federal Clean Air Act, 42 U.S.C. § 7401 *et seq.* Section 209(a) of the Clean Air Act prohibits States or their political subdivisions from "adopt[ing] or attempt[ing] to enforce *any standard relating to the control of emissions* from new motor vehicles or new motor vehicle engines subject to this part." 42 U.S.C. § 7543(a). The Clean Air Act's preemption provision also provides that "[n]o State shall require certification, inspection, *or any other approval relating to the control of emissions* from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment." *Id.* (Emphasis added.)

The District Court granted summary judgment to defendants. App. 27a. In the District Court's view, the Fleet Rules did not implicate the Clean Air Act's preemption provisions because they regulate only "the purchasing and leasing, not the sale, of vehicles by fleet operators." App. 21a. The court further held that "[t]he Fleet Rules do not set a 'standard relating to the control of emissions.' Rather than imposing any numerical control on new vehicles, the rules regulate the purchase of previously certified vehicles." *Id.* The District Court acknowledged the flatly contrary holdings of the First and Second Circuits, but distinguished each of those decisions on the grounds that they "hold that an attempt to limit the *sale* of vehicles is preempted." *Id.* (emphasis in original). Thus, the linchpin of the District Court's decision was its reasoning that the Clean Air Act's broad preemption of state and local emission regulations applies only to regula-

tions applicable to new motor vehicle *sales*, and not to identical regulations governing new motor vehicle *purchases*.

EMA and WSPA appealed to the Ninth Circuit. The Court of Appeals adopted the District Court's decision in whole. Specifically, the Ninth Circuit issued a published opinion adopting as its own the "well-reasoned opinion" of the District Court. App. 2a. The Court of Appeals subsequently denied EMA's request for rehearing on December 11, 2002. App. 29a.

## REASONS FOR GRANTING THE WRIT

### I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF THE OTHER FEDERAL CIRCUITS TO HAVE ADDRESSED THE ISSUE.

The Ninth Circuit's decision directly conflicts with the decisions of the First and Second Circuits on the scope and effect of the Clean Air Act's broad preemption provisions. Those decisions both found that regulations with "no purpose other than to effect a general reduction in emissions"—like the Fleet Rules here—are preempted by the Act.

In *American Auto. Mfrs. Ass'n* v. *Cahill*, 152 F.3d 196, the Second Circuit considered whether New York regulations requiring a percentage of all new vehicles sold in model years 1998-2003 to be zero-emission vehicles ("ZEVs") were preempted by the Clean Air Act. Section 209(a) of the Clean Air Act prohibits any state from "adopt[ing] or attempt[ing] to enforce any standard relating to the control of emissions from new motor vehicles." 42 U.S.C. § 7543(a). As explained above (at 6), the statute provides an exception, allowing California to adopt or enforce its own new-vehicle emissions standards, as long as California first obtains a waiver from the Environmental Protection Agency. *See* 42 U.S.C. § 7543(b). The statute also allows any other state to "opt in" to the California regulations if the state's standards



"are identical to the California standards for which a waiver has been granted for such model year" and are adopted "at least two years before commencement of such model year." *Id.* § 7507.

In the early 1990s, California adopted, and obtained a waiver for, its LEV Program, as described above. In addition to establishing progressively lower "fleet average" emissions standards for new vehicle manufacturers, the LEV Program also required that two percent of all new vehicles certified for sale in California for model years 1998-2000, five percent for model years 2001-2002, and ten percent for model year 2003, be ZEVs. New York adopted California's LEV program for light-duty vehicles pursuant to the Clean Air Act's "opt-in" provision.

California subsequently abandoned the ZEV sales requirement for model years 1998-2002, replacing it with individual Memoranda of Agreement ("MOAs") with the seven largest automobile manufacturers, requiring specific numbers of ZEVs to be sold during calendar years 1998-2000. New York, however, did not amend its regulations in response to the California changes, and automobile manufacturers challenged New York's ZEV sales requirement for model years 1998-2002 as preempted under Section 209 of the Clean Air Act.

Reviewing a district court decision which had found no preemption of the New York regulations, the Second Circuit considered whether the State's ZEV sales requirement was a "standard relating to the control of emissions" and therefore within Section 209's preemptive scope, or whether it was only an enforcement procedure and therefore not preempted. Noting that "standards relating to the control of emissions" are "regulatory measures intended to lower the level of auto emissions," the court found New York's ZEV requirement to constitute such a standard:

> To be sure, the ZEV sales requirement does not impose precise overall quantitative limits on levels of emissions, as do the classification system and fleet averages. It mandates only that a specified percentage of the [vehicles] sold by a manufacturer in any model year be ZEVs. Nevertheless, the ZEV sales requirement must be considered a standard "relating to the control of emissions." ZEV, after all, stands for "zero-emission vehicle," and a requirement that a particular percentage of vehicle sales be ZEVs *has no purpose other than to effect a general reduction in emissions* * * *. The ZEV sales requirement is, therefore, in the nature of *a command having a direct effect on the level of emissions*. [152 F.3d at 200 (emphases added).]

Finding that the ZEV sales requirement was a "standard" within the meaning of Section 209, the court concluded that the New York regulations were preempted by the Act. *See ibid.*[2] *See also MVMA*, 17 F.3d at 536 (Clean Air Act's preemption provisions prohibit limitations on the *types* of certified new motor vehicles that may be bought and sold in interstate commerce).

The First Circuit reached a similar conclusion in *Association of Int'l Auto. Mfrs.* v. *Commissioner, Mass. Dep't of Envtl. Prot.*, 208 F.3d 1, which considered Massachusetts's adoption of California's LEV program. Unlike New York, Massachusetts amended its regulations in response to the California MOAs; Massachusetts, however, did not adopt the MOAs in their entirety. The California MOAs provided that the manufacturers would develop ZEV technology and introduce a limited number of ZEVs into the California market during the years 1998-2002, and California, in

[2] The court also concluded that the New York ZEV program did not identically copy the California program as amended, and thus was not alternatively permitted under Section 177 of the Act. *Id.* at 201.



exchange, agreed to provide infrastructural support for ZEV implementation. The Massachusetts regulations were amended to reflect the automakers' obligations under the MOAs, but the reciprocal obligations undertaken by California were not also included. Automobile manufacturers challenged those regulations, arguing that because the Massachusetts program did not copy the California program in its entirety, the regulations were preempted by the Clean Air Act.

Reviewing the district court's conclusion that ZEV mandates were "standards relating to the control of emissions," the First Circuit agreed with the Second Circuit that "a requirement that a particular percentage of vehicle sales be ZEVs has no purpose other than to effect a general reduction in emissions." *Id.* at 7. The court continued:

> In contrast to [nonpreempted] "enforcement mechanisms" such as testing and reporting requirements, we think that numerical production requirements such as those in the Massachusetts ZEV mandates must be considered "standards relating to the control of emissions." Rather than simply monitoring or enforcing compliance with some distinct numerical emissions standard, *the very purpose and effect of the ZEV mandate is to effect a quantitative reduction in emissions*. [*Id.* at 6-7 (citations omitted and emphases added)].

Finding that the ZEV mandates are standards as that term is used in Section 209 of the Clean Air Act, the court concluded that Massachusetts's regulations were preempted by that section of the Act. *See id.* at 7. As a result, the court invalidated Massachusetts's ZEV program. *Id.*

As both *Cahill* and *Commissioner* emphasize, Section 209 expressly covers "standards relating to the control of emissions"; regulations are considered to be such standards where they have "no purpose other than to effect a general reduction in emissions." *Cahill*, 152 F.3d at 200; *see also Commis-*

*sioner*, 208 F.3d at 6. That is *exactly* the type of regulation that the South Coast Air Quality Management District has instituted here.

The Fleet Rules mandate that when certain local operators of fleets purchase or replace their fleet vehicles, they must acquire only those specific motor vehicles that the SCAQMD has designated as meeting "its standards and requirements." The Ninth Circuit recognized as much. App. 16a, 2a. Such regulations, which collectively require fleet operators to purchase or lease *only* low-emission or alternative-fuel vehicles, have "no purpose other than to effect a general reduction in emissions." *Cahill*, 152 F.3d at 200; *see also Commissioner*, 208 F.3d at 6.

Indeed, by requiring fleet operators—a group which by its nature controls large numbers of pollution-emitting vehicles in a given area—to purchase or lease vehicles with lower emissions, the SCAQMD imposed rules that would lead to a quantitative reduction in emissions. Even the District Court explicitly recognized that the SCAQMD adopted the Fleet Rules "in an effort to reduce public exposure to motor vehicle pollution." App. 15a. Thus, because the Fleet Rules are "regulatory measures intended to lower the level of auto emissions," *Cahill*, 152 F.3d at 200, they are "standards relating to the control of emissions" preempted by Section 209 of the Clean Air Act.[3]

[3] Furthermore, the extent to which the Fleet Rules actually serve to reduce the total level of emissions within the District is irrelevant. As the First Circuit observed in *Commissioner*, "Massachusetts' original contention that the ZEV mandates should not be considered standards simply because they would have a very small impact on overall emissions levels is unpersuasive—whether a regulation effects a small or great impact on overall emissions is a question of degree, not one of kind." 208 F.3d at 6.



But the Ninth Circuit concluded that "the Fleet Rules do not set a 'standard relating to the control of emissions.'" App. 21a, 2a. In support of this conclusion, the court distinguished *Cahill* and *Commissioner* by stating that "[t]hese cases hold that an attempt to limit the *sale* of vehicles is preempted. * * * It does not follow, however, that a rule regulating the *purchase* of vehicles is such a standard." App. 23a, 2a (emphasis in original).

Nowhere, however, does the Clean Air Act limit the "standards relating to the control of emissions" to rules regulating the *sale* of vehicles. Rather, the plain language of the Act makes clear that "standards" are found to exist where emissions levels are regulated, regardless of the means used. *See* 42 U.S.C. § 7543(a) (prohibiting states from imposing "*any* standard relating to the control of emissions") (emphasis added); *see also Commissioner*, 208 F.3d at 6; *Cahill*, 152 F.3d at 200.[4]

In addition, the Ninth Circuit's purely semantic distinction does not bear up under even slight scrutiny. It is impossible to imagine a situation in which a regulatory limit on *purchases* does not necessarily affect *sales*—especially here, where the customer base, fleet operators, is distinct. When all fleet operators in the South Coast Air Basin are required

[4] One might argue that the Ninth Circuit read the Clean Air Act's ban on restrictions as limited to "sales," rather than "purchases," from the second sentence in Section 209(a) of the Clean Air Act, which provides that no state shall put measures into place to control emissions as a "condition precedent to the initial retail sale, titling (if any), or registration" of a motor vehicle. 42 U.S.C. § 7543(a). However, this provision (which the court did not discuss at all), must be read in context with the broad prohibition in the first sentence of Section 209(a). *Id.* Thus, the prohibited standards include duties the state may place on the manufacturer (such as requirements before a sale), or on the consumer (such as requirements before titling and registration, or in this instance, limits on purchases).

to purchase only certain low-emissions or alternative-fuel vehicles for public transit, street sweeping, waste collection, and other public purposes, sales of such vehicles inevitably will be affected. The Ninth Circuit's attempt to characterize the Fleet Rules as only affecting vehicle purchases, and not sales, is therefore untenable; the Fleet Rules, like the New York and Massachusetts ZEV regulations, impact the trade of vehicles in their respective regions and in turn are standards "having a direct effect on the level of emissions," as contemplated by the Act.

The Court of Appeals also tried to distinguish the Fleet Rules from the ZEV regulations by noting that the Fleet Rules "regulate the purchase of previously-certified vehicles," rather than "imposing any numerical control on new vehicles." App. 21a, 2a. But, again, there is no support for the contention that "standards" as used in the Act are only those regulations that impose some type of a numerical requirement on manufacturers.

Moreover, as noted above, the Fleet Rules *do* impose numerical requirements on manufacturers, even if they do so indirectly. The truth of this observation is strongly supported by EPA's opinion letter discussed in *Commissioner*, in which the EPA provided its understanding of the term "standard" under the Act:

> Setting the link between the emission limit and the applicability of the limit to a particular number of vehicles is an inherent part of the standard setting process. * * * If a production requirement, such as the ZEV mandate, is not considered part of the standard itself, then the compliance with a standard * * * would be disconnected from the obligation to build cars to meet the standard. This could lead to emission standards that



> have no air quality benefit at all. [208 F.3d at 6 (quoting EPA Opinion Letter at 9).][5]

In addition to emphasizing that impact on emissions is the primary criterion in determining whether a regulation is a Clean Air Act "standard," the EPA letter reveals that state motor vehicle requirements must be read in terms of their practical application. In this case, the Fleet Rules require fleet operators to purchase only low-emission or alternative-fuel vehicles. As a result, manufacturers must provide more fleet vehicles that are LEVs, ULEVs, or that operate on alternative fuels. Indeed, if the Fleet Rules' purchase requirements were not considered part of the "standard," there would be a similar compliance "disconnect" here. Thus, despite the fact that the Fleet Rules do not impose numerical requirements *directly* on manufacturers, they nonetheless impose standards that require manufacturers to build more vehicles of certain lower emissions levels or fuel types, and thus in the EPA's construction are "standards" under the Act.

In short, both the First and Second Circuits, *and* the EPA, have concluded that regulations are Clean Air Act "standards" when they seek to bring about a general reduction in

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[5] Before the First Circuit decided *Commissioner*, it referred several questions to the Environmental Protection Agency under the doctrine of primary jurisdiction. *See Commissioner*, 208 F.3d at 3-4. The EPA responded in an opinion letter, in which it opined, as disclosed in the quote above, that the Massachusetts ZEV mandates are "standards" for purposes of Sections 209 and 177 of the Clean Air Act. *See id.* at 6. The First Circuit subsequently decided, however, that its referral to the EPA was "somewhat inartful," because the EPA opinion letter was not final agency action warranting any particular deference, but rather was an "advisory opinion only." *Id.* at 5-6. As a result, the First Circuit did not rely on the EPA's conclusion that the ZEV mandates are standards as that term is used in Sections 209 and 177 of the Act; nonetheless, it independently agreed with the EPA on this point. *See id.* at 7.

emission levels. The Fleet Rules, just like the ZEV regulations in New York and Massachusetts, were instituted to reduce emissions levels, and for this reason are identical to the regulations deemed "standards" by the First and Second Circuits. Yet, the Ninth Circuit failed to find federal preemption of these "standards." Thus, the Ninth Circuit's ruling creates a circuit split—and an especially intolerable one, because it introduces disparity in the operation of a federal law specifically armed with a preemption clause intended to promote national uniformity.

## II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PREEMPTION JURISPRUDENCE.

The scope of the Clean Air Act's express preemption of state and local regulation of emissions from new motor vehicles is expansive. This Court has long recognized that Section 209(a) of the Act comprehensively preempts state and local regulation of new motor vehicle emissions. *See Washington* v. *General Motors Corp.*, 406 U.S. 109, 114 (1972) ("Congress has largely pre-empted the field with regard to 'emissions from new motor vehicles' ").[6]

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[6] *See also Commissioner,* 208 F.3d at 3 (Congress "expressly preempted *all* state regulation of new motor vehicle emissions") (emphasis added); *Motor Vehicle Mfrs. Ass'n* v. *New York State Dep't of Envtl. Conservation,* 79 F.3d 1298, 1302 (2d Cir. 1996) ("In general, state regulation of automotive tailpipe emissions is preempted by the federal Clean Air Act"); *Motor & Equipment Mfrs. Ass'n* v. *EPA,* 627 F.2d 1095, 1109 (D.C. Cir. 1979) ("Congress in 1967 expressed its intent to occupy the regulatory role over emissions control to the exclusion of all the states, all, that is, except California"), *cert. denied*, 446 U.S. 952 (1980); *City of Chicago* v. *General Motors Corp.*, 467 F.2d 1262, 1264 (7th Cir. 1972) (section 209(a) preempts "the entire field of standards for emissions from new motor vehicles").



The consistency of the holdings regarding the breadth of the Clean Air Act's express preemption provisions is not surprising. Section 209(a) preempts state and local governments both from adopting or enforcing "any standard relating to the control of emissions from new motor vehicles" and from requiring "certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle * * * as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle." 42 U.S.C. § 7543(a). Taken together, these dual preemptions encompass virtually all state or local regulations directed at controlling emissions from new motor vehicles.

The Ninth Circuit, however, rejected this well-established jurisprudence relating to the Clean Air Act, and held that the SCAQMD Fleet Rules fall within neither of the two complementary preemption provisions of Section 209(a). That holding should not stand. The Fleet Rules *are* a "standard relating to the control of emissions from new motor vehicles," as both the First and Second Circuit have held. In addition, in certain situations the Fleet Rules require fleet operators to obtain approval certificates from the District as a condition precedent to the purchase of new vehicles. That too is expressly preempted by Section 209(a). Thus, the Ninth Circuit's ruling is in direct conflict with controlling jurisprudence relating to Section 209(a).

The Ninth Circuit's decision also flatly conflicts with this Court's numerous holdings recognizing the breadth of the phrase "relating to" when used in preemption statutes. *See, e.g., Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992) (the phrase "related to" used in a preemption statute "express[es] a broad preemptive purpose"). Instead, and contrary to this Court's precedent, the lower court strained to narrow the scope of the Clean Air Act's express preemption provisions and improperly looked beyond its plain meaning in a freewheeling reconstruction of legislative

history. *See Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 906 (2000) ("a freewheeling judicial inquiry into whether [state law] is in tension with federal objectives would undercut the principle that it is Congress [and federal agencies] rather than the courts that preempt state law.") (Brackets in original). The result of the Ninth Circuit's disregard of the express terms of the Clean Air Act is a wholesale evisceration of preemption and Congressional purpose, all contrary to this Court's prior decisions.[7]

The Fleet Rules clearly "relate to" the "control of emissions from new motor vehicles." Indeed, control of emissions is the entire purpose and effect of the Fleet Rules. App. 15a (noting that Fleet Rules are "an effort to reduce public exposure to motor vehicle pollution"). There can be no doubt that the Fleet Rules are "in connection with" the control of emissions, or that their "purpose and effect * * * is to effect a quantitative reduction in emissions." *Commissioner*, 208 F.3d at 7. Moreover, it can hardly be disputed that the Fleet Rules make "reference to" the control of emissions given that they incorporate a subset of vehicle standards approved by CARB for purposes of emissions control. The fact that the Fleet Rules expressly limit the purchase of vehicles to those that are certified to a subset of the applicable California numerical emission limits, while prohibiting the purchase of vehicles that comply with other valid California and federal emission limits, necessarily

[7] The court's "freewheeling" approach also yielded a result in direct conflict with the recently expressed view of the United States on the broad scope of preemption "relating to" new motor vehicles. *See* Br. Amicus Curiae of the United States, *Central Valley Chrysler-Plymouth, Inc.* v. *Michael P. Kenny*, No. 02-16395 (9th Cir.) (arguing that "under the 'connection with or reference to' standard embraced by the Supreme Court, the California emission control regulations at issue [in that case] are clearly preempted"). An excerpt of the United States' submission in the *Central Valley* case is appended hereto. App. 30a-42a.



means that the Rules are preempted "standards" relating to control of vehicle emissions. The Ninth Circuit's ruling to the contrary thus clearly warrants review.

## III. THE QUESTION PRESENTED IS AN ISSUE OF NATIONAL IMPORTANCE AND SHOULD BE DECIDED BY THIS COURT.

Preemption is the "cornerstone" of the portions of the Clean Air Act governing the regulation of new motor vehicles. *MVMA*, 17 F.3d at 526. The Ninth Circuit's decision substantially undermines the Clean Air Act's preemption provisions; it thus presents an issue of national importance, particularly to the United States Government and the EPA.[8] If the court's holding stands, any State or political subdivision may enact its own unique emission requirements simply by prescribing that no one subject to its jurisdiction may purchase or lease a new motor vehicle that is not an alternative-fuel vehicle, or that no one may purchase or lease a new motor vehicle that, for example, is not a "low emission vehicle" by some definition. And there would be no assurance whatsoever that each state and political subdivision would designate the same "subset" of "approved" new motor

[8] *See* Br. of United States as Amicus Curiae, *Motor Vehicle Mfrs Ass'n* v. *New York State Dep't of Envtl. Conservation*, 79 F.3d 1298 (discussing challenge to California regulations alleged to violate Clean Air Act's "third vehicle" prohibition); Br. of United States as Amicus Curiae, *MVMA*, 17 F.3d 521 (discussing challenge under Clean Air Act to State rules regulating tailpipe emissions); *see also* Br. of United States as Amicus Curiae, *Norfolk S. Ry. Co.* v. *Shanklin*, 529 U.S. 344 (2000) (noting "strong interest" of United States in how statute with an express preemption provision—there, the Federal Railroad Safety Act—is "interpreted and applied"); Br. of United States as Amicus Curiae, *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001) (noting "substantial interest" of United States in question whether federal law preempted state-law tort claims alleging fraud on the FDA).

vehicles. The result would be that interstate commerce in motor vehicles would be subjected to the varying requirements of the fifty states and their thousands of political subunits—the very result Congress meant to avoid by explicitly preempting regulation in this field.

Congress broadly preempted local regulations relating to the control of emissions from new motor vehicles specifically "to prevent a chaotic situation from developing in interstate commerce in new motor vehicles," H.R. Rep. No. 90-728 (1967), *reprinted in* 1967 U.S.C.C.A.N. 1938, 1956, and to avoid "the spectre of an anarchic patchwork of federal and state regulatory programs, a prospect which threatened to create nightmares for the manufacturers." *Engine Mfrs. Ass'n* v. *EPA*, 88 F.3d at 1079. The Fleet Rules bring that chaos to life, and the Ninth Circuit's decision upholding the rules flouts Congress's express directive against balkanization of the nationwide market for new motor vehicles. The impact of such a fractured market for new motor vehicles in the United States would be to increase significantly the cost of manufacturing marketable vehicles and engines.

The Ninth Circuit's decision not only fractures the nationwide market for motor vehicles, it also undermines the ability of the Federal government to establish, implement and achieve its emission standards for new motor vehicles. In preempting states and local governments from regulating new motor vehicles, Congress also imposed on the Federal government the obligation to set emission standards for, and reduce emissions from, new motor vehicles. 42 U.S.C. § 7521. The primacy of EPA's nationwide emission reduction standards was recognized by Congress. Thus, California may obtain a waiver of federal preemption for its standards only if, among other things, EPA determines that the California standards are "at least as stringent as" and "at least as protective of health and welfare as" the comparable Federal standards. 42 U.S.C. § 7543(b).



However, under the Ninth Circuit's decision, political subdivisions of states are free to mandate the purchase of any subset of the types of new motor vehicles certified by EPA or California. While the SCAQMD has attempted to pick and choose its subsets ostensibly to set more stringent emission standards, there is nothing in the Ninth Circuit's decision that would prevent a political subdivision from adopting a local mandate requiring the purchase of the highest emitting certified vehicles while prohibiting the purchase of the lowest emitting vehicles. Such an approach, implicitly condoned by the Ninth Circuit, would undermine the Federal government's ability to reduce emissions from new motor vehicles, which suggests that the United States Government would want to be heard on this issue (*see supra* n.8), and which further warrants this Court's review.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDICES

**APPENDIX A**

**PUBLISHED AT 309 F.3d 550**

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 01-56688
(D.C. No. CV-00-09065-FMC)

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ENGINE MANUFACTURERS ASSOCIATION, *et al.*,
*Plaintiffs-Appellants,*

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, *et al.*,
*Defendants-Appellees.*

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Filed October 24, 2002

**OPINION**

Appeal from the United States District Court for the Central District of California, Florence Marie Cooper, District Judge, Presiding, D.C. No. CV-00-09065-FMC.

Before GOODWIN, RYMER, and McKEOWN, Circuit Judges.

## ORDER

Engine Manufacturers Association and Western States Petroleum Association appeal the district court's judgment that the fleet rules adopted by the South Coast Air Quality Management District are not preempted by the Clean Air Act.

We affirm the decision of the district court for the reasons stated in its well-reasoned opinion, reported at *Engine Mfrs. Ass'n* v. *South Coast Air Quality Mgmt. Dist.*, 158 F.Supp.2d 1107 (C.D. Cal. 2001).[1]

AFFIRMED.

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[1] We decline to consider Amici's arguments regarding § 246 of the Clean Air Act. "Generally, we do not consider on appeal an issued raised only by amicus." *Swan* v. *Peterson*, 6 F.3d 1373, 1383 (9th Cir. 1993).



## APPENDIX B

## PUBLISHED AT 158 F.Supp.2d 1107

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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No. CV 00-09065-FMC (BQRx)

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ENGINE MANUFACTURERS ASSOCIATION, *et al.*,
*Plaintiffs,*

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, *et al.*,
*Defendants.*

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Filed August 22, 2001

OPINION

**ORDER RE CROSS MOTIONS FOR SUMMARY JUDGMENT**

COOPER, District Judge.

# I. BACKGROUND

## A. *The Parties*

Plaintiff Engine Manufacturers Association ("EMA") is the not-for-profit trade association representing the leading manufacturers of internal combustion engines used in most all medium-duty and heavy-duty motor vehicles, other than passenger cars. EMA members manufacture the medium-duty and heavy-duty compression-ignition, diesel-fueled engines that are installed in certain pickup trucks and sports-utility vehicles, delivery vans, shuttle vans, and cargo vehicles, trucks, tractor-trailers, waste haulers, street-sweepers and buses, and sold throughout the United States.

Plaintiff-in-Intervention Western States Petroleum Association ("WSPA") is a trade association organized as a nonprofit corporation under California law. Its members consist of companies engaged in the exploration, production, transportation, refining and marketing of crude oil and petroleum products, including diesel fuel.

Defendant South Coast Air Quality Management District ("SCAQMD") is the air quality management district established under the California Health and Safety Code to develop and implement a strategy for achieving and maintaining ambient air quality standards within the South Coast Air Basin. Agents of the SCAMQD, including the SCAMQD Defendants,[1] are responsible for administering the Fleet Rules at issue.

[1] The "SCAQMD Defendants" consist of thirteen (13) Board members of the SCAQMD, including the SCAQMD's Executive Director.



Defendants-in-Intervention "Environmental Intervenors" are non-profit organizations[2] dedicated to the protection of the environment and public health.

California Attorney General Bill Lockyer submitted an *amicus curiae* brief on behalf of the State of California in support of the SCAQMD's motion for summary judgment and in opposition to the crossmotions for summary judgment filed by EMA and WSPA.

## B. *The South Coast Air Basin*

The South Coast Air Basin ("the Basin"), which includes Los Angeles, San Bernardino, Riverside, and Orange Counties, experiences the most serious air quality problems in the nation, primarily due to motor vehicle pollution. (Staff Report ("SR") 1191-1, p. 7439). It is the only air basin in the country classified by the United States Environmental Protection Agency ("E.P.A.") as an extreme nonattainment area. *See* 42 U.S.C. § 7511(a). On-road motor vehicles contribute more than one-half of the ozone precursors emitted in the Basin and are a principal source of toxic pollution. (Administrative Record ("AR") 57 R-6252).

Emission of particulate matter from diesel vehicles and equipment is the most significant individual toxic air pollutant in the Basin, accounting for fully seventy-one percent (71%) of the air-borne cancer risk. (AR 57 R-6258). The California Air Resources Board ("CARB") has formally designated particulate emissions from diesel-fueled vehicles as a Toxic Air Contaminant. Studies reveal that exposure to diesel exhaust increases the risk of developing lung cancer and other non-cancer adverse health effects. (AR 41

[2] The non-profit organizations include: Coalition for Clean Air, Inc.; Natural Resources Defense Council, Inc.; Communities for a Better Environment, Inc.; Planning and Conservation League; and Sierra Club.

R-1840). Diesel exhaust has also long been considered a probable human carcinogen by the National Institute of Occupational Safety and Health and by the International Agency for Research on Cancer. (AR 41 R-1841).

Diesel trucks and buses are also significant contributors to smog and fine particles, two pollutants that have serious public health impacts. On-road motor vehicles contribute more than half of all smog-forming hydrocarbons and oxides of nitrogen in the entire emissions inventory. (SR 1191-1, p. 7439). More than ninety-percent (90%) of the particles emitted from diesel engines are fine particles. (AR 54 R-5514-5515). Fine particles are particularly hazardous, because they can bypass respiratory defense mechanisms and penetrate deeply into the lungs. (AR 20 R 5783). The presence of high quantities of fine particles in the air has been shown to lead to higher mortality rates, greater occurrences and severity of asthma, cardiovascular disease, and potentially to a higher incidence of cancer. (AR 39 R-1325).

*C. Legislative Background*

*1. The Clean Air Act*

The Clean Air Act, 42 U.S.C. §§ 7401-7671q ("CAA"), "is one of the most comprehensive pieces of legislation in our nation's history." *Motor Vehicle Mfrs. Ass'n* v. *New York State Dep't of Envtl. Conservation,* 17 F.3d 521, 524 (2d Cir.1994). The CAA makes "the States and the Federal Government partners in the struggle against air pollution." *General Motors Corp.* v. *U.S.*, 496 U.S. 530, 532, 110 S. Ct. 2528, 110 L. Ed. 2d 480 (1990). A primary purpose of the CAA is "to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention." 42 U.S.C. § 7401(c). Additionally, Congress envisioned the CAA as a means of encouraging and assisting "the development and operation of regional air pollution prevention and control programs." 42 U.S.C. § 7401(b)(4).



The CAA directs the E.P.A. to establish and enforce national ambient air quality standards ("NAAQS") for pollutants that "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7408(a). To achieve and maintain these NAAQS by regulating sources of air pollution, each state is required to submit a state implementation plan ("SIP") to the EPA for approval. CAA § 110, 42 U.S.C. § 7410(a)(1). However, states may not promulgate individual motor vehicle emission standards to attain the NAAQS set by the EPA. Section 209(a) expressly preempts all state regulation of motor vehicle emissions. Congress preempted the field of vehicle emission regulation for two reasons: "to ensure uniformity throughout the nation, and to avoid the undue burden on motor vehicle manufacturers which would result from different state standards." *Motor Vehicle Mfrs. Ass'n* v. *New York State Dep't of Envtl. Conservation,* 810 F.Supp. 1331, 1337 (N.D.N.Y.1993), *aff'd in part, rev'd in part,* 17 F.3d 521 (2d Cir.1994).

"Both the history and text of the [CAA] show that the * * * preemption section was made not to hamstring localities in their fight against air pollution but to prevent the burden on interstate commerce which would result if, instead of uniform standards, every state and locality were left free to impose different standards for exhaust emission control devices for the manufacture and sale of new cars." *Allway Taxi Inc.* v. *City of New York*, 340 F.Supp. 1120,1124 (S.D.N.Y.1972).

*2. Preemption*

The United States Supreme Court has given substantial weight in the preemption analysis to evidence that Congress intended to preserve the state regulatory authority, stating

that courts must "give full effect to evidence that Congress considered, and sought to preserve, the States' coordinate regulatory role in our federal scheme." *California* v. *Fed. Energy Regulatory Comm'n,* 495 U.S. 490, 497, 110 S. Ct.. 2024, 109 L. Ed. 2d 474 (1990). Moreover, the Supreme Court has cautioned that preemption provisions must be narrowly and strictly construed. *See Kelly* v. *Robinson,* 479 U.S. 36, 43, 107 S. Ct. 353, 93 L. Ed. 2d 216 (1986); *see also Charas* v. *Trans World Airlines, Inc.*, 160 F.3d 1259, 1265 (9th Cir.1998); *Chrysler Corp.* v. *Tofany,* 419 F.2d 499, 511 (2d Cir.1969) (where exercise of local police power serves the purpose of a federal Act, the preemptive effect of that Act should be narrowly construed).

The Clean Air Act explicitly protects the authority of states to regulate air pollution. The first section of the CAA, entitled "Congressional Findings", 42 U.S.C. § 7401, makes clear that the states retain the leading authority in regulating matters of health and air quality: "air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3). Similarly, 42 U.S.C. § 7407, which focuses on SIPs, provides: "Each state shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State." 42 U.S.C. § 7407(a).

"In preemption analysis, the Supreme Court is highly deferential to state law in areas traditionally regulated by the states." *Exxon Mobil Corp.* v. *U.S. E.P.A.*, 217 F.3d 1246, 1255 (9th Cir. 2000). The Court has explained:



> [W]e have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of preemption with the starting presumption that Congress does not intend to supplant state law * * * [I]n cases like this one, where federal law is said to bar state action in fields of traditional state regulation * * * we have worked on the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

*N.Y. State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.,* 514 U.S. 645, 654-55, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995) (internal citations omitted). "Air pollution prevention falls under the broad police powers of the states, which include the power to protect the health of citizens in the state. Environmental regulation has traditionally been a matter of state authority." *Exxon Mobil Corp.*, 217 F.3d at 1255; *see also Massachusetts* v. *U.S. Dep't of Transp.,* 93 F.3d 890, 894 (D.C.Cir.1996).The Supreme Court has directed that the preemption analysis begin with the presumption that such local police powers are not preempted: "Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens. Because these are 'primarily, * * * matter[s] of local concern,' the 'States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" *Medtronic, Inc.* v. *Lohr,* 518 U.S. 470, 475, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) (internal citations omitted). The CAA "explicitly preserved this principle: 'Each state shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State.'" *Train* v. *Natural Res. Def. Council, Inc.,* 421 U.S. 60, 64, 95 S. Ct. 1470, 43 L. Ed. 2d 731 (1975).

Furthermore, the Supreme Court has made clear that the objectives and purpose of a statute, as well as the text, are critical to the preemption analysis. *See Travelers,* 514 U.S. at 654, 115 S. Ct. 1671; *Medtronic,* 518 U.S. at 486, 116 S. Ct. 2240. "The overriding purpose of the Clean Air Act is to force states to do their job in regulating air pollution effectively so as to achieve baseline air quality standards, the NAAQS. The primary mechanism for achieving the NAAQS are through the local and state planning process which create the SIPs." *Exxon Mobil Corp.*, 217 F.3d at 1255-56. "As regulating air pollution falls under the historic police powers of the states, the authority of the states is assumed not to have been preempted unless it was the clear and manifest purpose of Congress to do so." *Id.* at 1256; *see also Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947) ("[W]e start with the assumption that the historic police powers of the States were not to be superceded by the Federal Act unless that was clear and manifest purpose of Congress.").

*3. Legislative History of the Clean Air Act*

The original CAA, enacted by Congress in 1955, was aimed primarily at increasing federal research and assistance in air pollution prevention. It made no provision for federal motor vehicle emission standards. After several states adopted their own motor vehicle emission standards, the Senate Committee on Public Works decided that national standards were to be preferred over having each state go its own way, "which could result in chaos insofar as manufacturers, dealers, and users are concerned." S. Rep. No. 192, 89th Cong., 1st Sess. 5-6 (1965). As a result, Congress enacted emission standards for new motor vehicle engines.

Despite this enactment, a number of states continued to develop separate emission ; ograms. Congress promptly amended the CAA in 1967 to impose federal preemption



over motor vehicle emission standards. *See* Air Quality Act of 1967, Pub. L. No. 90-148, § 208, 81 Stat. 485. An exception, however, was made for California because of its "unique problems" and its "pioneering efforts" to control its particularly severe air quality problems. *Id.* at § 208(b); S. Rep. No. 403, 90th Cong., 1st Sess. (1967). In 1970, the Act was amended to establish national ambient air quality standards ("NAAQS"), which required even more stringent uniform emission standards for new motor vehicles. *See* Clean Air Amendments of 1970, Pub. L. No. 91-604, §§ 4, 6, 84 Stat. 1676.

In 1990, the Clean Air Act was amended once again. Title I of the Act directs the E.P.A. Administrator to develop NAAQS for pollutants the Administrator determines "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7408(a)(1)(A). The states are vested with the primary responsibility for attaining and maintaining the NAAQS through the development and implementation of a state implementation plan ("SIP"). *See* CAA § 110, 42 U.S.C. § 7410. Each state's SIP, which is submitted to the E.P.A., must explain exactly how the state intends to reduce or maintain the concentration of pollution in the air to meet the NAAQS. "The states have broad license to institute their own programs for the reduction of air pollution. * * *" *Motor Vehicle Mfrs. Ass'n,* 17 F.3d at 525.

Title II of the Act reflects Congress' endeavor to resolve the problems caused by moveable sources or vehicle emissions. The emission standards applicable to any given vehicle depend upon its weight and use classification, and its model year designation. *See* CAA §§ 202, 207(c), 42 U.S.C. §§ 7521, 7541(c). Section 202 authorizes the E.P.A. Administrator to promulgate emission standards for motor vehicles sold in the United States. Motor vehicle emission standards primarily regulate emissions of carbon monoxide (CO),

hydrocarbons or volatile organic compounds (VOCs) and nitrogen oxides (NOx).

The "cornerstone of Title II is Congress' continued express preemption of state regulation of automobile emissions." *Motor Vehicle Mfrs. Ass'n,* 17 F.3d at 526; *see* CAA § 209(a), 42 U.S.C. § 7543(a); *see also Engine Mfrs. Ass'n* v. *U.S. Envtl. Prot. Agency,* 88 F.3d 1075, 1079 (D.C.Cir.1996). The majority of states have chosen to rely on the federal emission standards set forth in § 202 of the CAA, 42 U.S.C. § 7521. Only California enjoys a statutory exemption allowing it to promulgate its own emission standards. *See* CAA § 209(b), 42 U.S.C. § 7543(b)(1). California may only adopt and enforce its own emission standards, however, after applying to and obtaining the approval of the E.P.A. for a waiver of preemption. *See* CAA § 209(b), 42 U.S.C. 7543. The California Air Resources Board ("CARB") submits an application upon determining that its proposed standards "will be, in the aggregate, at least as protective of public health and welfare as the applicable Federal standards." *Id.* Were California simply to change its standards, and such change were found to be within the scope of an existing waiver, California need not submit a new waiver application. *Id.*

Additionally, other states could promulgate regulations requiring vehicles sold in their state to be in compliance with California's emission standards, or, in other words, to "piggyback" onto California's preemption exception. This opt-in authority, set forth in CAA § 177, 42 U.S.C. § 7507, is carefully drafted to avoid placing "an undue burden on the automobile manufacturing industry." *Motor Vehicle Mfrs. Ass'n*, 17 F.3d at 527. Specifically: (1) an opt-in state must adopt standards identical to California's; (2) California must receive a waiver from the E.P.A. for the standards; and (3) both California and the opt-in state must adopt the standards at least two years before the beginning of the automobile



model year to which they apply. *See* CAA § 177, 42 U.S.C. § 7507.

The 1990 Amendments to the CAA added two further restrictions to § 177. First, Congress added language providing that § 177 shall not be construed as authorizing an opt-in state to limit the sale of California-certified vehicles. Second, it forbade opt-in states from taking any action that has the effect of creating a car different from those produced to meet either federal or California emission standards, a so-called "third vehicle."

*4. California's Plan*

Pursuant to its authority to adopt separate emission control requirements for new motor vehicle engines, California, acting through CARB, has enacted two stringent emission control programs for motor vehicles: one for light and medium-duty motor vehicles, including certain diesel-fueled vehicles (the "LEV Program"), and one for heavy-duty urban transit buses (the "Urban Bus Program").

*a. The LEV Program*

In adopting the LEV Program in 1990-1991, CARB established the most stringent exhaust regulations ever for light and medium-duty vehicles. The regulations include three primary elements: (1) four tiers of exhaust emission standards for increasingly stringent categories of low-emission vehicles; (2) a mechanism requiring manufacturers to phase in a progressively cleaner mix of vehicles from year to year; and (3) a requirement that a specified percentage of passenger cars and lighter light-duty trucks be zero-emission vehicles ("ZEVs"). (SR 1191-4, p. 7442).

The four tiers of exhaust emission standards, in descending order of emission levels are: (1) Transitional Low-Emission Vehicles ("TLEVs"); (2) Low-Emission Vehicles ("LEVs");

(3) Ultra-Low-Emission Vehicles ("ULEVs"); and (4) Zero-Emission Vehicles ("ZEVs"). For each category a set of more stringent emission standards for carbon monoxide, nitrogen oxides and formaldehyde applies. The LEV Program achieves emission reductions by requiring manufacturers to sell progressively cleaner mixes of vehicles over time. The average emissions from the mix of these categories of vehicles produced by a given manufacturer in a given year must meet an overall "fleet average" requirement. Automobile manufacturers, under CARB's regulations, have the flexibility to decide how many vehicles of each type they manufacture and sell in order to meet the fleet average. Additional flexibility is provided through the establishment of a marketable credit system: manufacturers may earn credits if they sell more LEVs than needed to meet the fleet average.

*b. The Urban Bus Program*

On February 24, 2000, CARB adopted its Urban Bus Program ("UBP") to further reduce air pollution from large urban transit buses. The UBP requires: (i) reductions in particulate matter ("PM") and oxides of nitrogen ("NOx") fleet emissions by urban transit bus operators; and (ii) stringent exhaust emission standards applicable to engine manufacturers. To implement the CARB regulation, urban transit bus fleet operators are required to choose between two different compliance paths: (i) a diesel path or (ii) an alternative fuel path. Fleet operators were required to notify CARB of their choice by January 31, 2001.

Fleet operators choosing the diesel path may continue to purchase diesel powered buses as long as they comply with emission standards. These emission requirements specify that engines meet an eighty-percent (80%) PM emission reduction by October 2002. For the 2004 model year, CARB established an optional NOx emission standard representing



an eighty-seven percent (87%) emission decrease relative to the current NOx standard. For the 2007 model year, diesel transit bus engines must comply with a NOx emission standard that would result in a ninety-five percent (95%) emission decreases relative to the current NOx standard. Transit agencies on the diesel path with more than 200 urban buses in their active fleet (on January 31, 2001) must place into service at least three zero-emission buses ("ZEBs") by July 1, 2003, and operate them for a year as a required demonstration project. From model year 2008 through model year 2015, a minimum fifteen percent (15%) of all new bus purchases or leases must be ZEBs for the transit Agencies on the diesel path. (SR 1192-4, p. 7545). ZEBs must be certified by CARB and are expected to be powered by fuel cells, electricity, or other fuels that result in zero-emission exhaust levels. (SR 1192-5, p. 7546).

The Alternative-Fuel Path requires at least eighty-five percent (85%) of new bus purchases to be alternative-fueled. Alternative fuels are defined as compressed natural gas, liquefied natural gas, liquefied petroleum gas, methanol, electricity, fuel cells, or other advanced technologies that do not rely on diesel fuel. (SR 1192-6, p. 7547; SR 1192-2, p. 7543). Transit operators would need to introduce ZEBs into their fleets by 2010. Additionally, retrofit requirements to reduce PM emissions from existing buses, are required under both paths.

*D. The Fleet Rules*

In response to the need for the South Coast Basin to reduce pollution levels dramatically to achieve its NAAQS, the California state legislature in 1987 adopted Health and Safety Code § 40447.5, which authorizes the SCAQMD to adopt fleet rules in an effort to reduce public exposure to motor vehicle pollution. On June 16, 2000, August 18, 2000, and October 20, 2000, the SCAQMD adopted six rules (referred

to hereinafter as the "Fleet Rules"), each of which mandates that when certain local operators of fleets purchase or replace their fleet vehicles, they must acquire only those specific motor vehicles that the SCAQMD has designated as meeting its standards and requirements.

*1. Fleet Rule 1191*

Rule 1191 requires passenger car, light-duty truck, or medium-duty vehicle public fleet operators to acquire low-emitting gasoline or alternative-fueled vehicles[3] when procuring or leasing these vehicles in the District. The Rule applies to all government agencies and any special districts with 15 or more on-road light and medium-duty vehicles. Rule 1191 also contains specified exemptions. (Rule 1191(f))

*2. Fleet Rule 1192*

Rule 1192 requires public transit fleet operators to acquire alternative-fuel heavy-duty vehicles[4] when procuring or leasing vehicles to reduce air toxic and criteria pollutant emissions. This Rule applies to public transit fleets with 15 or more public transit vehicle or urban buses, operated by government agencies or operated by private entities under contract to government agencies, that provide passenger

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3 "Alternative-fueled vehicle" is defined under the Rule as "a vehicle or engine that is not powered by gasoline or diesel fuel and emits hydrocarbon, carbon monoxide, or nitrogen oxides, on an individual basis at least equivalent to or lower than a ULEV based on [C]ARB's certification data." (Rule 1191(c)(1)).

4 "Alternative-fuel heavy-duty vehicle" is defined as a "heavy-duty vehicle, urban bus or engine that uses compressed or liquified natural gas, propane, methanol, electricity, fuel cells, or other advanced technologies that do not rely on diesel fuel," and that meets the emissions requirements of the Urban Transit Bus Rule adopted by CARB. (Rule 1192(c)(1)).



transportation services. The Rule requires these fleet operators to acquire alternative-fuel vehicles when adding or replacing vehicles. Rule 1192 also contains specified exemptions. (Rule 1192(e)).

*3 Fleet Rule 1193*

Rule 1193 requires public and private solid waste collection fleet operators to acquire alternative-fuel[5] refuse collection heavy-duty vehicles when procuring or leasing these vehicles. The Rule applies to government agencies and private entities that operate solid waste collection fleets with 15 or more solid waste collection vehicles. Acquisition of dual-fueled vehicles[6] is allowed for fleets of 15 or more transfer or rolloff vehicle.[7] Rule 1193 also contains specified exemptions. (Rule 1193(e)).

*4. Fleet Rule 1194*

Rule 1194 applies to public and private fleet operators of 15 or more vehicles that transport passengers from commercial airports located in the District. The affected vehicles include taxis, shuttles, and limousines. The Rule requires

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5 Under Rule 1193, "alternative-fuel heavy-duty vehicles" use compressed or liquefied natural gas, liquefied petroleum gas, methanol, electricity, fuel cells, or other advanced technologies that do not rely on diesel fuel. (Rule 1193(c)(1)).

6 A "dual-fuel heavy duty vehicle" is a "heavy-duty vehicle equipped with a diesel engine that uses an alternative fuel . . . in combination with diesel fuel to enable compression ignition. A dual-fuel engine typically used the alternative fuel to supply 85 percent of the total engine fuel requirement. * * *" (Rule 1193(c)(2)).

7 A "rolloff vehicle" is "any heavy-duty vehicle used for the express purpose of transporting waste containers such as open boxes or compactors." (Rule 1193(c)(5)).

passenger car, light-duty truck, medium-duty transit vehicle, and heavy-duty transit vehicle fleet operators to acquire cleaner burning or alternative-fueled vehicles[8] when procuring or leasing these vehicles in the District, unless otherwise exempt. Fleet operators using passenger cars or medium-duty vehicles to provide airport transportation services must purchase a specified percentage of vehicles that meet CARB's standards for ultra low emission vehicles. Fleet operators that use heavy-duty vehicles must purchase alternative-fuel vehicles. Specified exemptions are provided for under this Rule as well. (Rule 1194(e)).

*5. Fleet Rule 1186.1*

Rule 1186.1 requires certain public and private sweeper fleet operators to acquire alternative-fuel or otherwise less-polluting sweepers when purchasing or leasing these vehicles for sweeping operations undertaken by or for governments or governmental agencies in the District's jurisdiction. Rule 1186.1 also requires government agencies that contract for sweeping services to solicit bids or contract for services that use alternative-fuel sweepers. An "alternative-fuel sweeper" is one with "engine(s) that use compressed or liquefied natural gas, liquefied petroleum gas (propane), methanol, electricity, or fuel cells. Hybrid-electric and dual-fuel technologies that use diesel fuel are not considered alternative-fuel technologies for the purposes of this rule." (Rule 1186.1(c)(2)). Specified exemptions are also provided for. (Rule 1186.1(f)).

*6. Fleet Rule 1196*

Rule 1196 requires public fleet operators of heavy-duty vehicles to acquire alternative-fuel heavy-duty vehicles when

[8] An "alternative-fueled vehicle" means "a light or medium-duty vehicle, or heavy-duty transit vehicle or engine that is not powered by gasoline or diesel fuel." (Rule 1194(c)(2)).



procuring or leasing these vehicles. The Rule applies to all government agencies located in the District and to any special districts such as water, air, sanitation, transit, and school districts, with 15 or more heavy-duty vehicles. These operators must acquire alternative-fuel vehicles, dual-fuel vehicles, or dedicated gasoline vehicles when adding or replacing heavy-duty vehicles. Specified exemptions are provided for under the Rule as well. (Rule 1196(f)).

*E. Procedural History*

On November 21, 2000, Plaintiff EMA filed its First Amended Complaint against the SCAQMD Defendants for declaratory and injunctive relief, challenging the constitutionality of the Fleet Rules. Specifically, Plaintiff EMA claims the Fleet Rules violate Sections 209 and 177 of the federal Clean Air Act, 42 U.S.C. §§ 7543 and 7507, as well as the Supremacy Clause of the United States Constitution, U.S. Const. Art. V1, cl. 2, and are therefore preempted as a matter of law. On January 17, 2001, Plaintiff-in-Intervention WSPA also brought suit against the SCAQMD Defendants and the Environmental Intervenors for declaratory and injunctive relief, claiming the Fleet Rules violate CAA §§ 209 and 177 and the Supremacy Clause.[9]

On March 23, 2001, Plaintiffs and Defendants filed cross motions for summary judgment. Plaintiffs moved for summary judgment on counts one (1) through six (6) of their respective Complaints.[10] On April 20, 2001 California

[9] Plaintiff EMA and Plaintiff-in-Intervention WSPA will hereinafter collectively be referred to as "Plaintiffs." The SCAQMD Defendants and Defendants-in-Intervention Environmental Intervenors will hereinafter collectively be referred to as "Defendants."

[10] On July 25, 2001 the parties entered into a stipulated dismissal of count seven (7) of Plaintiff EMA's First Amended Complaint.

Attorney General Bill Lockyer submitted an *amicus curiae* brief on behalf of the State of California in support of Defendants' Motions for Summary Judgment and in opposition to Plaintiffs' Motions for Summary Judgment.

The parties have stipulated that this case should be adjudicated on the pleadings, as no material factual disputes are at issue. The case turns entirely on the scope of the express preemption provisions of §§ 209 and 177 of the Clean Air Act. After considering the parties' written and oral arguments, the Court issues the following decision:

## II.

## DISCUSSION

### *A. CAA § 209(a)*

Section 209(a) of the Clean Air Act provides:

> No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment. 42 U.S.C. § 7543(a).

Plaintiffs argue that the Fleet Rules violate CAA § 209(a) because they constitute "standard[s] relating to the control of emissions from new motor vehicles or new motor vehicle engines." Plaintiffs also assert that the Fleet Rules establish unlawful conditions precedent to the sale of new motor vehicles or engines.



The Court does not accept Plaintiffs' interpretation of the impact of the Fleet Rules. The Rules regulate the purchasing and leasing, not the sale, of vehicles by fleet operators. Fleet operators are required to purchase "cleaner" vehicles when adding or replacing fleet vehicles. The Fleet Rules accept as given the existing CARB vehicle standards; they merely require fleet operators to choose from among the least polluting of CARB-certified, available vehicles. The Rules impose no new emission requirements on manufacturers whatsoever, and therefore do not run afoul of Congress's purpose behind motor vehicle preemption: namely, the protection of manufacturers against having to build engines in compliance with a multiplicity of standards. *See People of State of Cal. ex rel. State Air Resources Bd.* v. *Department of Navy*, 431 F.Supp. 1271, 1285 (N.D.Cal.1977), *aff'd by* 624 F.2d 885 (9th Cir.1980) ("The reasons given for the enactment of the preemption provision can be summarized as follows: to protect the manufacturer against having to build engines, which would comply with a multiplicity of standards; to protect the vehicle owner from having to deal with different standards in each state in which he drives; to avoid the unnecessary duplication of federal standards; to avoid 'unnecessary expense' to the owner; and generally to avoid 'chaos' and 'confusion.' " (internal citations omitted)).

Furthermore, the Fleet Rules do not set a "standard relating to the control of emissions." Rather than imposing any numerical control on new vehicles, the rules regulate the purchase of previously-certified vehicles. Plaintiffs rely primarily on two cases to support their contention that the Fleet Rules constitute unlawful standards: *Am. Auto. Mfrs. Ass'n* v. *Cahill,* 152 F.3d 196 (2d Cir.1998) and *Ass'n of Int'l Auto. Mfrs., Inc.* v. *Commissioner,* 208 F.3d 1 (1st Cir.2000). These cases hold that an attempt to limit the *sale* of vehicles is preempted. In *Cahill* and *Commissioner,* the states of New York and Massachusetts, respectively, adopted California's emission standards targeting ZEVs. Under the California

regulations, two percent (2%) of all new vehicles certified for sale in California for model years 1998-2000, five percent (5%) for model years 2001-2002, and ten percent (10%) for model year 2003 were required to be ZEVs. California's program was granted a § 209(b) waiver by the E.P.A. in 1993, and New York and Massachusetts adopted the program pursuant to CAA § 177.[11] Both the Second Circuit in *Cahill* and the First Circuit in *Commissioner* held that "the ZEV sales requirement must be considered a standard 'relating to the control of emissions.'" *Cahill,* 152 F.3d at 200; *Commissioner,* 208 F.3d at 6. The ZEV program mandated that a specified percentage of cars sold by manufacturers in any

[11] *In Cahill,* the state of New York adopted California's LEV program for light-duty vehicles pursuant to the CAA's opt-in provision. New York's classification system, fleet average requirements, and ZEV sales requirements were identical, with one exception, to those of California for model years 1998-2003. That exception concerned medium-duty vehicles, which were included in California's ZEV requirements but not in New York's. Additionally, New York maintained the ZEV sales requirement for model years 1998-2002 even after California had abandoned it. The automobile manufacturers associations brought suit to prevent the enforcement of New York's 1998-2002 ZEV sales requirement.

In *Commissioner,* automobile manufacturers brought suit against the Massachusetts Department of Environmental Protection, claiming automobile emission standards adopted by the state of Massachusetts were preempted by the CAA. After California repealed its ZEV requirements for the model years 1998-2000, it entered into memoranda of agreements ("MOAs") with seven major automakers by which the manufacturers agreed to develop ZEV technology and introduce a limited number of ZEVS into the California market. In exchange, California agreed to provide infra-structural support for ZEV implementation. Massachusetts amended its ZEV mandates to reflect the automakers' obligations under the MOAs, but did not include the reciprocal obligations undertaken by California.



model year be ZEVs. "The ZEV sales requirement is, therefore, in the nature of a command having a direct effect on the level of emissions, rather than in the nature of a means of enforcing, or testing the effectiveness of, a command." *Cahill,* 152 F.3d at 200.

It does not follow, however, that a rule regulating the *purchase* of vehicles is such a standard. The Fleet Rules require purchasers to choose from among a subset of previously certified California vehicles. Where a state regulation does not compel manufacturers to meet a new emissions limit, but rather affects the purchase of vehicles, as the Fleet Rules do, that regulation is not a standard. No restriction on the sale of vehicles is present here. Plaintiffs may continue to sell any vehicle which is otherwise certified in California.

Furthermore, CAA § 246, 42 U.S.C. § 7586, expressly recognizes that Fleet Rules must be established in areas with particularly high pollution levels, and authorizes restrictions on the purchase of fleet vehicles to meet clean-air standards. Specifically, section 246 requires that "[e]ach state in which there is located all or part of a covered area * * * shall submit * * * a State implementation plan revision * * * to establish a clean-fuel vehicle program for fleets under this section." 42 U.S.C. § 7586(a)(1). Section 246 also mandates that "a specified percentage of all new covered fleet vehicles * * * purchased by each covered fleet operator in each covered area shall be clean-fuel vehicles and shall use clean alternative fuels. * * *" 42 U.S.C. § 7586(b). It is not rational to conclude that the CAA would authorize purchasing restrictions on the one hand, and prohibit them, as a prohibited adoption of a "standard," on the other.

Additionally, through its Health and Safety Code, California has mandated these Rules be enacted by Districts with severe air quality problems. The South Coast Air Basin is the only "extreme" nonattainment area for ozone in the

country. It is classified as a "severe" nonattainment area for particulate matter and has extremely high levels of toxic air pollution throughout the region. The California legislature enacted Health and Safety Code § 40447.5 in response to the need for the South Coast Air Basin to reduce pollution. Section 40447.5 authorizes the District to "[r]equire operators of public and commercial fleet vehicles * * * in the south coast district, when adding vehicles to or replacing vehicles in an existing fleet or purchasing vehicles to form a new fleet, to purchase vehicles which are capable of operating on methanol or other equivalently clean burning alternative fuel and to require that these vehicles be operated, to the maximum extent feasible, on the alternative fuel when operating in the south coast district." Such state regulations are presumed to be valid. *See, e.g., Medtronic, Inc.* v. *Lohr,* 518 U.S. 470, 475, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) (stating that the preemption analysis begins with the presumption that local police powers, such as air pollution prevention, are not preempted: "Throughout our history the several states have exercised their police powers to protect the health and safety of their citizens. Because these are 'primarily, and historically, * * * matter[s] of local concern,' the 'States traditionally have had great latitude under their police powers to legislate as to the protection of the * * * health * * * of all persons.'") (internal citations omitted) (cited in *Exxon Mobil Corp.* v. *U.S. Envtl, Prot. Agency,* 217 F.3d 1246, 1255 (9th Cir.2000)).

The Court therefore concludes that the Fleet Rules do not constitute unlawful standards "relating to the control of emissions."

*B. Section 177*

Plaintiffs argue that the Fleet Rules violate CAA § 177, which provides:



> Notwithstanding section 7543(a) of this title, any State which has plan provisions approved under this part may adopt and enforce for any model year standards relating to control of emissions from new motor vehicles or new motor vehicle engines and take such other actions as are referred to in section 7543(a) of this title respecting such vehicles if ¶(1) such standards are identical to the California standards for which a waiver has been granted for such model year, and
>
> (2) California and such State adopt such standards at least two years before commencement of such model year (as determined by regulations of the Administrator).
>
> Nothing in this section or in subchapter II of this chapter shall be construed as authorizing any such State to prohibit or limit, directly or indirectly, the manufacture or sale of a new motor vehicle or motor vehicle engine that is certified in California as meeting California standards, or to take any action of any kind to create, or have the effect of creating, a motor vehicle or motor vehicle engine different than a motor vehicle or engine certified in California under California standards (a "third vehicle") or otherwise create such a "third vehicle."

42 U.S.C. § 7507.

As discussed earlier, CAA § 177 permits states other than California to "piggyback" onto California's standards if the state's standards are identical to California standards for which a waiver has been granted for a model year. Section 177, however, applies only to non-California "opt-in" states. The statutory language supports this conclusion. After first referring to states that adopt the California standards, section 177 declares that "any such state" is subject to certain limitations. The word "such" indicates that the statute is

referring back to the non-California "opt-in" states. Section 177 has no application to the right of the District to regulate the purchase of fleet vehicles.

Furthermore, Congress' purpose in enacting § 177 is to prevent states from adopting and enforcing standards in a manner that would create a "third vehicle." *See Motor Vehicle Mfrs. Ass'n*, 17 F.3d at 528. Evident in the statutory scheme is Congress' desire not to burden manufacturers with "myriad state emission regulations." *Id.* at 531. Congress restricted states to duplicating either federal or California standards in order "to protect motor vehicle manufacturers from the undue burden of complying with more than two different regulatory schemes." *Am. Auto. Mfrs. Ass'n* v. *Comm'r*, 998 F.Supp. 10, 13 (D. Mass.1997) (quoting *Motor Vehicle Mfrs. Ass'n*, 810 F.Supp. at 1339).

> [Section 177] prevents opt-in states from imposing different emission requirements on new vehicles and engines that would place an undue burden on manufacturers by requiring them to produce materially different new vehicles for sale in such areas. To the extent that a manufacturer could demonstrate that each vehicle leaving the assembly line performs at levels to which it was certified, that manufacturers could claim 'undue burden' if a state that adopted the California standard applied enforcement procedures that would require materials [sic].changes in the manufacture of such vehicles, i.e., production of a third car.

Senate Comm. on Pub. Works, 103d Cong., 1st Sess., *A Legislative History of the Clean Air Act Amendments of 1990*, Serial No. 103-38, Vol. 1 at 1022. Therefore, "there can only be two types of cars in this country: 'California' cars or 'federal' cars'. States cannot adopt any other standards which would require automakers to create a 'third' car." *Commissioner*, 998 F. Supp. at 13.



The Fleet Rules impose no such "third car" requirement. Rather, they require purchasers to choose from among a subset of previously certified vehicles. Automobile manufacturers will not be forced to do something more than they already must do. Restricting purchases to the types of engines already approved in California and for which a waiver has been granted will not violate § 177's "third vehicle" prohibition. Section 177 bans any requirement for a third vehicle, not all requirements intended to reduce motor vehicle emissions. The CAA and its legislative history show that Congress limited the burden upon manufacturers to that of designing and manufacturing two versions of each motor vehicle, and no more. The Fleet Rules may lead to decreased demand for some cars and trucks certified for sale in California, but the Rules do not require the manufacturers to build or sell any particular model for this area. The Court concludes, therefore, that even if § 177 were to apply, the Fleet Rules do not run afoul of Congress' purpose in enacting § 177.

## III. CONCLUSION

The Court concludes that the Fleet Rules are not preempted by § 209(a) of the Clean Air Act and are a valid exercise of the SCAQMD's authority. Section 177 does not apply to the District's Fleet Rules. Plaintiffs' Motions for Summary Judgment as to counts one through six of their Complaints are denied. Defendants' Motions for Summary Judgment are granted.

IT IS SO ORDERED.

## APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 01-56688
(D.C. No. CV-00-09065-FMC)

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ENGINE MANUFACTURERS ASSOCIATION, *et al.*,
*Plaintiffs-Appellants,*

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, *et al.*,
*Defendants-Appellees.*

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Filed December 11, 2002

ORDER

Before: GOODWIN, RYMER, and McKEOWN, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. Judges Rymer and McKeown have voted to deny the petition for rehearing *en banc*, and Judge Goodwin recommended denial.



The full court has been advised of the petition for rehearing *en banc* and no active judge has requested a vote on whether to rehear the matter *en banc*. Fed.R.App.P.35.

The petition for rehearing is DENIED and the petition for rehearing *en banc* is DENIED.

## APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

---

No. 02-16395
(D.C. No. CV-F-02-5017 REC/SMS)

---

CENTRAL VALLEY CHRYSLER-PLYMOUTH, INC., *et al.*,
*Plaintiffs-Appellees,*

v.

MICHAEL P. KENNY,
*Defendant-Appellant.*

---

EXCERPT OF BRIEF OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

---

### INTEREST OF THE *AMICUS CURIAE*

As part of the Energy Policy and Conservation Act, Congress has mandated federal fuel economy standards. In so doing, Congress also expressly preempted any state laws or regulations relating to fuel economy standards. The United States has a substantial interest in enforcing the federal fuel economy standards and in ensuring that states adhere to the Congressional directive prohibiting them from "adopt[ing] or enforce[ing]" any "law or regulation related to fuel economy standards or average fuel economy standards for automobiles." 49 U.S.C. § 32919(a).



### STATEMENT OF THE ISSUE

Whether the provisions of the California's Zero Vehicle Emission regulations granting credits for hybrid vehicle, if they meet specified criteria, are preempted under 49 U.S.C. § 32919(a), because the criteria are defined in reference to fuel economy standards.

### STATEMENT OF THE CASE

*1. Federal Fuel Economy Standards.*

a. In the aftermath of the 1973-1974 Arab oil embargo, Congress in 1975 enacted the Energy Policy and Conservation Act ("EPCN"). The EPCA was intended to conserve energy, to increase the supply of fossil fuels in the United States, and to reduce American dependence on foreign oil. *See* S. Rep. No. 516, 94th Cong., 1st Sess. 116, reprinted in 1975 U.S. Code Cong. & Ad. News 1956, 1957.

Title III of the EPCA added a new Title V to the Motor Vehicle Information and Cost Savings Act, introducing a program of mandatory fuel economy standards for passenger cars and light trucks to be implemented by the Department of Transportation. *See* P.L. 94-163, 89 Stat. 901, codified as amended at 49 U.S.C. § 32901, *et seq*. For model year 1985, Congress set a 27.5 miles per gallon ("mpg") fuel economy standard, a figure that would represent an approximate doubling of then-existing average passenger car fuel economy. 49 U.S.C. § 32902(b). Congress authorized the agency to modify the 27.5 mpg standard for a particular model year to the level which it determines is the "maximum feasible average fuel economy level" for that year. 49 U.S.C. § 32902(a). The statute sets out four criteria for the agency to apply in determining maximum feasible average fuel economy standards. 49 U.S.C. § 32902(f). The agency must consider (1) technological feasibility; (2) economic practica-

bility, (3) the effect of other motor vehicle standards on fuel economy, and (4) the need of the Nation to conserve energy. *Ibid.*

The Act does not require that every vehicle, or every model, meet the fuel economy standard for a given model year. The Act requires instead that the average fuel economy level of all of a manufacturer's passenger cars and light trucks meet the applicable standard. Thus, the fuel economy standard which a manufacturer is required to meet for a given model year is known as the Corporate Average Fuel Economy or "CAFE" standard, and the level which the manufacturer actually achieves in a given model year is known as the CAFE level. 49 U. S.C. § 32902; *see, e.g.* 67 Fed. Reg. 16052 (2002) (establishing the light truck CAFE level for model year 2004).

Federal law defines an "automobile" as a "four-wheeled vehicle that is propelled by fuel, or by alternative fuel, manufactured primarily for use on public streets, roads, and highways," with a gross vehicle weight rating up to 10,000 pounds. See 49 U.S.C. § 32901(a)(3). *See also* 49 C.F.R. § 523.3 (defining "automobile" under the CAFE program). Furthermore, 49 U.S.C. § 32901(a)(3) defines "alternative fuel" to include "electricity." An "alternative fueled automobile" means an automobile that either has a single "dedicated" fuel type (such as natural gas or electricity) or is "dual fueled," meaning that it uses regular fuels such as gasoline as well as an alternative fuel. *Id.* at §§ 32901(a)(2)(A) and 32901(a)(2)(B).

Federal law specifically addresses the manner in which cars running on "alternative fuel" are to be factored into a manufacturer's CAFE rating, requiring that the CAFE calculation include all vehicles, including electric vehicles and should include the "equivalent petroleum based fuel economy values



determined by the Secretary of Energy for various classes of electric vehicles." 49 U.S.C. § 32904(a)(2)(B).

b. In enacting the federal CAFE standards, Congress explicitly and broadly preempted all state laws relating to fuel economy standards:

> [w]hen an average fuel economy standard prescribed under this chapter is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.

49 U.S.C. § 32919(a).

*2. The Clean Air Act.*

The Clean Air Act ("CAA") also contains a preemption provision. It provides that "no State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines." 42 U.S.C. § 7543(a). The CAA, however, permits California to adopt standards for the control of emissions from new motor vehicles that are in the aggregate at least as protective of public health and welfare as federal standards. See 42 U.S.C. § 7543(b). The Administrator of EPA must waive preemption under the Clean Air Act for those state standards, unless the Administrator makes specified findings regarding protectiveness, necessity, and consistency with certain Clean Air Act provisions. *Ibid.*

*3. California's ZEV Program.*

The California Air Resources Board first adopted the Zero Emissions Vehicle ("ZEV") program in 1990 as part of its efforts to regulate exhaust emissions from automobiles. 2001-19 Cal. Reg. L. Bull. 204. *See* 13 Cal. Code Regs.

§ 1962. The regulations originally required large automakers to produce vehicles as a specified percentage of their fleet that produce no exhaust emissions of criteria pollutants or their precursors. Excerpts of Record ("ER") 364. In the face of questions regarding the feasibility of these goals, the Board repeatedly amended the ZEV regulations, ultimately issuing in 2001 the final rule at issue in this litigation. *See* 13 Cal. Code Regs. § 1962.

The rule at issue requires that for model years 2003 through 2008, at least 10% of the passenger cars and light-duty trucks produced by a manufacturer and delivered for sale in California must be ZEVs. 13 Cal. Code Regs. § 1962(b)(1)(A); ER 367. After that date, the percentage rises incrementally to 16% for 2018 and subsequent model years. 13 Cal. Code Regs. § 1962(b)(1)(A); ER 367.

The regulations contemplate that it would be too costly for manufacturers to meet these standards solely by the production of pure Zero Emission Vehicles. ER 362-363. Accordingly, the regulations allow manufacturers to accrue "ZEV credits" through the production of "Partial Zero Emission Vehicles" or "PZEVs," and "advanced technology" PZEVs. *See* 13 Cal. Code Regs. § 1962(c). Automobiles can qualify for an allowance as advanced technology PZEVs "if the manufacturer demonstrates to the reasonable satisfaction of the [State] Executive Officer that the vehicle is equipped with advanced ZEV componentry such as an advanced battery integral to the operation of the vehicle power train or an electric power train." *See* 13 Cal. Code Regs. § 1962(c)(4)(B).

Gasoline-electric hybrid vehicles can qualify as advanced technology PZEVs—and hence qualify for ZEV credits—but only if they meet one of the alternative standards prescribed in the regulations. *See* 13 Cal. Code Regs. § 1962(c)(4)(B); ER 403. These include the "Efficiency Method" and the



"Carbon Dioxide ($CO_2$) Reduction Method." 13 Cal. Code Regs. § 1962(c)(4)(B)(1) and (2).

*a. The Efficiency Method.*

For a hybrid vehicle to qualify for credits under the "Efficiency Method," the vehicle must achieve a certain level of efficiency as measured by its federal fuel economy rating as compared with the class average. See 13 Cal. Code Regs. § 1962(c)(4)(B)(2); ER 403. As provided under the Efficiency Method, a vehicle's "Advanced Componentry Allowance" is measured through a formula under which its "California Miles Per Equivalent Gallon" is divided by a function of its "Baseline Fuel Economy."' 13 Cal. Code Regs. § 1962(c)(4)(B)(2).

* * *

*4. Proceedings Below.*

Plaintiffs—General Motors Corporation, Daimler-Chrysler Corporation, and several California automobile dealers—sought to enjoin enforcement of the 2001 regulations, arguing that the regulations fall within the broad preemption of the EPCA. ER 1-15. California argued that its rule permissibly regulates emissions and that the provisions relating to fuel economy standards merely represented some of the options by which manufacturers could comply with the regulatory standards.

Plaintiffs filed a motion for a preliminary injunction. ER 163-165. After a hearing and extensive briefing, the court granted plaintiffs' motion. ER 1052-1067. The court found that plaintiffs had demonstrated a "strong likelihood of success on the merits of their claim that the AT PZEV option set forth in the 2001 ZEV amendments is completely preempted by [49 U.S.C. § 32919(a)] * * * and that plaintiffs will suffer irreparable injury if the requested preliminary

injunction is not granted because of the very substantial costs of compliance with the 2001 ZEV Amendments." ER 1066.

In holding that plaintiffs were likely to prevail on their preemption claim, the court explained, "[p]laintiffs have shown that the 2001 ZEV amendments 'relate to' fuel economy standards because they clearly have the purpose of regulating the fuel economy performance of * * * advanced technology hybrids * * * [that plaintiffs] predict [ ] the industry will sell in California." ER 1056-1057. The court noted that the specific state regulations incorporate federal fuel economy test procedures, and that qualifying vehicles are credited based upon their fuel consumption as measured using the federal procedure. ER 1057. The court found that the state regulations have the practical effect of regulating fuel economy based on California's calculation of the expected number of hybrids that would use the advanced technology provision to earn additional credits. The court rejected the State's argument that the preemption provision should not apply because the State's requirements are focused on the reduction of emissions, and do not conflict with the objectives of the CAFE provisions. The court explained, "[p]reemption cannot be avoided by intertwining preempted requirements with nonpreempted requirements." ER 1059. The court also rejected the State's contention that the availability of other options for obtaining ZEV credits saved from preemption the options linked to fuel economy. ER 1060-1061. The court found that options linked to fuel economy would be the lowest cost options available and that the other options did not in fact offer a "viable alternative." ER 1061.

The court then determined that the automakers would suffer irreparable injury from enforcement of the 2001 ZEV rules. The court found that the automakers had shown that would have to spend hundreds of millions of dollars to comply with the 2001 ZEV regulations (accord Cal. Br. 19),



and that those investments could not be recovered from California due to sovereign immunity. ER 1065.

## SUMMARY OF ARGUMENT

A. In the Energy Policy and Conservation Act, Congress expressly preempted all state laws or regulations "related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter." 49 U.S.C. § 32919(a). The phrase "related to" used in a preemption statute "express[es] a broad preemptive purpose," *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992), and, here, preempts any state statute or regulation "if it has a connection with or reference to" fuel economy standards. *Egelhoff* v. *Egelhoff ex rel. Breiner*, 532 U.S. 141, 147 (2001).

Under the "connection with or reference to" standard embraced by the Supreme Court, the California regulations at issue here clearly are preempted. Specifically, the regulations' "Efficiency Method," "$CO_2$ Reduction Method," and "High-Efficiency Allowance" all refer to fuel economy ratings and provide credits or allowances based on the level of a vehicle's fuel economy rating. For example, a threshold fuel economy level must be met to qualify for credits under the "$CO_2$ Reduction Method." Then, once that threshold level is met, the number of credits earned depends upon the vehicle's fuel economy rating: the better the fuel economy ratings, the greater the ZEV credits.

Because these California regulations directly refer to fuel economy levels, and because manufacturer credits are based on the level of a vehicle's fuel economy rating, they are preempted under the plain terms of section 32919(a).

B. The State argues that these standards are not preempted because manufacturers may also meet ZEV requirements

through various alternative means. The Supreme Court, however, has rejected the notion that a state's provision of options or even the ability to freely opt out of the state law provision saves the state law from the effects of an express federal preemption statute. *See Egelhoff* v. *Egelhoff ex rel. Breiner, supra*.

The primary case relied upon by the State, *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978), is not to the contrary. *Ray* did not involve an express preemption provision, such as the one here, addressing a particular subject that Congress has determined may not be the subject of state regulation.

* * *

## ARGUMENT

### THE CALIFORNIA 2001 ZEV REGULATIONS ARE PREEMPTED UNDER 49 U.S.C. § 32919(a).

A. Article VI of the United States Constitution commands that the laws of the United States "shall be the supreme Law of the Land; * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2. *See also McCulloch* v. *Maryland*, 4 Wheat. 316, 427 (1819) ("It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments"). Thus, "[a] fundamental principle of the Constitution is that Congress has the power to preempt state law." *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 372 (2000). *See also Gibbons* v. *Ogden*, 9 Wheat. 1, 211 (1824). "State law may be preempted "by express language in a congressional enactment, * * * by implication from the depth and breadth of a congressional scheme that occupies the legislative field, * * * or by implication because of a conflict with a



congressional enactment." *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 540 (2001).

In the present case, state law has been preempted by express language in a congressional enactment. The Energy Policy and Conservation Act provides that when a federal fuel economy standard is in effect "a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter." 49 U.S.C. § 32919(a).

The phrase "related to" in the statute is broad on its face, and as the Supreme Court has held in interpreting similar language in other preemption statutes, "express[es] a broad preemptive purpose." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992) (interpreting the preemption provision of the Airline Deregulation Act, 49 U.S.C. § 41713); *see also American Airlines, Inc.* v. *Wolens*, 513 U.S. 219 (1995). In *Morales*, the statute at issue expressly preempted the States from "enact[ing] or enforc[ing] any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. at 383. The Court recognized that the "ordinary meaning" of the key phrase "relating to" " is a broad one—'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with,' Black's Law Dictionary 1158 (5th ed. 1979)—and the words thus express a broad preemptive purpose." *Ibid.*

In another context where Congress used similar language—29 U.S.C. § 1144(a)—preempting all state laws "related to" an ERISA plan—the Supreme Court has addressed the phrase many times and has "observed repeatedly that this broadly worded" language is "clearly expansive."

*Egelhoff* v. *Egelhoff ex rel. Breiner*, 532 U.S. 141, 146 (2001). *See also Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983) (the "breadth of [the ERISA provision's] preemptive reach is apparent from [its] language"); *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 739 (1985) (the "related to" language has a "broad scope"); *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 46-47, 107 S. Ct. 1549, 1552-1553, 95 L. Ed. 2d 39 (1987) (the language has an "expansive sweep," and must be read as "deliberately expansive"); *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 138 (1990) (the preemption statute is "broadly worded"); *FMC Corp.* v. *Holliday*, 498 U.S. 529 58 (1990) (the statute is "conspicuous for its breadth").

In the other contexts where Congress has employed the "related to" language in a preemption provision, the Court has explained that a state statute is preempted "if it has a connection with or *reference to such a plan*." *Egelhoff*, 532 U.S. at 147 *(quoting Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. at 97) (emphasis added). *See also Morales* v. *TWA*, 504 U.S. at 384 (adopting the same standard for the Airline Deregulation Act preemption provision).

Whatever the outer limits of this expansive "related to" language may be, they need not be decided in this case, however, because the preemption provision of the Energy Policy and Conservation Act clearly encompasses the California regulations at issue here. Under the "connection with or reference to" standard embraced by the Supreme Court, there can be no question that the California regulations at issue here are subject to preemption because they expressly speak in "reference to" fuel economy ratings, with regulatory credits for vehicle manufacturers based on the level of the fuel economy rating.

This is most evidently the case with the "Efficiency Method," which allows manufacturers to qualify for ZEV



credits by producing hybrid vehicles with a federal fuel economy rating at least 30% better than a standard level set by the regulations. *See* 13 Cal. Code Regs. § 1962(c)(4)(B)(2); ER 64-65. The regulations provide regulatory credits for the vehicle manufacturer based solely on comparing the vehicle's fuel economy ratings, measured using the federal test procedure, to a specified class average fuel economy.

* * *

At bottom, the State asks this Court to ignore the statutory language and to deduce whether Congress would have wanted to preempt regulations that establish fuel economy standards for vehicle manufacturers, because they are a part of a regulatory program addressing emissions. As the Supreme Court has recently observed, however, such "[a] freewheeling judicial inquiry into whether [state law] is in tension with federal objectives would undercut the principle that it is Congress [and federal agencies,] rather than the courts[,] that pre-emp[t] state law." *Geier* v. *American Honda Motor Co.*, 529 U.S. at 906 (brackets in original) (quoting *Gade* v. *National Solid Wastes Management Assn.*, 505 U.S. at 111 (Kennedy, J., concurring)). In any event, the "the plain language of the enacted text is the best indicator of [congressional] intent." *Nixon* v. *United States*, 506 U.S. 224, 231 (1993). Thus, when construing a preemption statute, a court must "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. at 383 (*quoting FMC Corp.* v. *Holliday*, 498 U.S. at 56-57). The plain language of section 32919(a) clearly encompasses the regulations at issue in this case. Accordingly, further inquiry into whether Congress would have wanted to preempt the regulations at issue here would be both unnecessary and inappropriate.

Even if California's intent is to regulate emissions, it cannot escape the effect of the EPCA preemption provision. The preemption provision contains no exceptions based on the purpose or purposes of a state's fuel economy regulation. When state regulations by their terms make compliance by the vehicle manufacturer dependent in whole or in part on a vehicle's fuel economy, as these regulations do, the terms and purpose of the preemption provision are implicated directly.

## CONCLUSION

For the reasons stated above, the judgment of the district court should be affirmed.

Respectfully Submitted,

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OCTOBER 2002

Supreme Court, U.S.
FILED
APR 14 2003

No. 02-1343

IN THE

# Supreme Court of the United States

ENGINE MANUFACTURERS ASSOCIATION AND WESTERN STATES PETROLEUM ASSOCIATION,

*Petitioners,*

*v.*

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals properly determined that Section 209(a) of the Clean Air Act, 42 U.S.C. § 7543(a), does not preempt air quality rules adopted by the South Coast Air Quality Management District because those rules, which require fleet operators purchasing new motor vehicles to purchase the least polluting vehicles from among those previously certified for sale in California, are not a "standard relating to the control of emissions from new motor vehicles"?

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Respondents South Coast Air Quality Management District, *et al.* and Respondents Natural Resources Defense Council, *et al.* (collectively, "Respondents"), respectfully request that this Court deny the Petition for a Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Ninth Circuit in this case.

## STATEMENT OF THE CASE

The Petition for a Writ of Certiorari filed by Petitioners Engine Manufacturers Association and Western States Petroleum Association presents no issues that warrant this Court's review. The "Fleet Rules" that Petitioners challenge were enacted to reduce harmful emissions from certain motor vehicle fleets and plainly further the federal Clean Air Act's core purpose—to reduce pollution. Moreover, the Fleet Rules impose no requirements on manufacturers; instead, they only require fleet operators, when purchasing new vehicles, to choose from among the least polluting vehicles already certified for sale by the State of California and the federal government. Consequently, as the Ninth Circuit and district court correctly found, the rules do not establish a preempted "standard relating to the control of emissions from new motor vehicles" within the meaning of Section 209(a) of the Clean Air Act, 42 U.S.C. § 7543(a).

Petitioners have invented a conflict in the decisions of the circuit courts of appeals that does not exist. *See* Petition for a Writ of Certiorari (hereafter "Pet.") at 3. As recognized in the opinion of the district court, which was affirmed and adopted by the court of appeals (Judges Goodwin, Rymer, and McKeown), the cases that Petitioners cite as creating the alleged conflict are plainly distinguishable from the present case, and thus are not in conflict with it. Pet. App. 21a-23a.

Petitioners' other arguments fare just as poorly. They cite *Morales v. Trans World Airlines*, 504 U.S. 374 (1992), for the proposition that the lower courts erred in refusing to broadly construe the preemption provisions of the Clean Air Act. Pet. at 3, 19. Petitioners, however, ignore later opinions of this Court that sharply retreat from the holding of *Morales*. Furthermore, Petitioners are simply incorrect in asserting (Pet. at 18) that the Clean Air Act expansively preempts *all* state and local regulations that reduce emissions from motor vehicles. To the contrary, and as recognized by the lower courts in this case (Pet. App. 23a), under the Clean Air Act, states and local governments expressly retain broad authority to regulate stationary and mobile sources of air pollution. This authority includes the power to adopt and enforce rules requiring fleet operators to acquire lower emitting motor vehicles from among those already certified for sale. *See* Clean Air Act § 246, 42 U.S.C. § 7586.

Finally, Petitioners term the present case of "national importance," asserting that, if the Fleet Rules are upheld, numerous jurisdictions could adopt their own, unique "emission requirements" that manufacturers would need to meet. Pet. at 21. Petitioners are wrong. First, as the district court and court of appeals held, the Fleet Rules are not vehicle emission "standards" preempted by Section 209(a). Pet. App. at 24a. Second, the rules do not require manufacturers to produce and sell *any* new vehicles. Pet. App. at 27a. Rather, they only require purchasers to choose from among the cleanest vehicles already manufactured.[1] As such, the Fleet Rules are fully consistent with Congress's principal purpose in enacting Section 209(a): to prevent state and local

1. Thus, any "Fleet Rules" that any other jurisdiction might conceivably adopt also would have to require the purchase of vehicles that manufacturers are already producing.



regulations from requiring manufacturers to produce a new type of vehicle.

In short, this case presents an ordinary question of statutory interpretation that the courts below decided easily and correctly on the basis of existing law. The Court should deny the Petition for a Writ of Certiorari.

## BACKGROUND

### A. The Clean Air Act.

The Clean Air Act ("CAA") places the primary responsibility for the prevention and control of air pollution on state and local governments. CAA § 101(a)(3), 42 U.S.C. § 7401(a)(3). As the Act makes clear, "air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments." *Id.* While the CAA requires the federal government to set national air quality standards, CAA § 108(a), 42 U.S.C. § 7408(a), it mandates state and local governments to design and implement programs to achieve these standards. CAA § 110, 42 U.S.C. § 7410. To help ensure that the national air quality standards are met, Congress provided states and local governments with an exceptionally broad arsenal of regulatory tools. Under the CAA, those governments expressly retain almost unfettered authority to adopt or enforce "*any* standard or limitation respecting emissions of air pollutants" and "*any* requirement respecting control or abatement of air pollution." CAA § 116, 42 U.S.C. § 7416 (emphasis added).

Contrary to Petitioners' implication that states have no ability to control emissions from motor vehicles, this broad array of authority includes the power to enact state and local programs to reduce pollution from motor vehicles. For example, the CAA specifically authorizes state and local motor vehicle inspection and maintenance programs, as well as transportation control programs designed to reduce vehicle miles traveled. CAA § 182(b)(4), 42 U.S.C. § 7511a(b)(4); § 182(c)(5), 42 U.S.C. § 7511a(c)(5). Most significantly for purposes of the instant case, the CAA also authorizes states to adopt clean-fuel vehicle fleet rules, which have the same effect as the Fleet Rules in this case. CAA § 246, 42 U.S.C. § 7586.

There are only a few, specifically enumerated exceptions to the broad authority that the CAA gives to states and local governments. These exceptions include "certain"—*but not all*—types of regulation of moving sources of pollution: the adoption of "standards" relating to motor vehicle and aircraft emissions, and the regulation of fuel content. CAA § 116, 42 U.S.C. § 7416. As is relevant here, only the federal Environmental Protection Agency ("EPA") and the State of California are to set "standards" for the control of emissions from new motor vehicles or engines. CAA § 202(a), 42 U.S.C. § 7521(a); CAA § 209(b), 42 U.S.C. § 7543(b).[2] Section 209, 42 U.S.C. § 7543, prohibits other states and local governments from adopting or enforcing their own "standards." However, Section 177 of the CAA authorizes

2. Section 209(b) of the Act, 42 U.S.C. § 7543(b), authorizes California to adopt and enforce its own motor vehicle emission standards in recognition of the state's "unique problems" of air pollution and its "pioneering efforts" to control its particularly severe air quality problems. Pet. App. at 11a.



other states to adopt and enforce California's standards in place of the federal standards. CAA § 177, 42 U.S.C. § 7507.

Thus, the CAA authorizes the manufacture of only two types of motor vehicles: (1) vehicles that meet EPA's emission control standards, and (2) vehicles that meet California standards. Pet. App. at 12a-13a. In adopting Section 177, which confirms the two vehicle restriction established by Section 209, Congress expressed its intent to prevent states, other than California, and local governments from requiring "production of a third car." *See* Senate Comm. on Pub. Works, 103d Cong., 1 A Legislative History of the Clean Air Act Amendments of 1990, S. Doc. No. 103-38, at 1022 (1st Sess. 1993).

**B. California's Vehicle Regulatory Program.**

Pursuant to the authorization in Section 209(b) of the CAA, California's Air Resources Board ("CARB") has adopted motor vehicle emission standards setting the numerical limits on pollutants that can be emitted from vehicles produced for sale in California. Pet. App. at 13a. For light and medium-duty vehicles, CARB adopted several "tiers" of motor vehicle emission standards, each of which corresponds to a set of numerical emission levels for specific motor vehicle pollutants. Pet. App. at 13a-14a. CARB's regulations allow manufacturers to produce vehicles in any of four tiers as long as the manufacturers meet an overall average emissions level. *Id.* at 14. These regulations also require manufacturers to produce a progressively cleaner mix of motor vehicles over time. *Id.*

For heavy-duty vehicles, CARB has promulgated both generally applicable emission standards (Cal. Code Regs.

tit. 13, § 1956.8) and a more stringent set of numerical standards that urban transit buses must meet in the future (*id.* § 1956.1 *et seq.*) ("Urban Transit Bus Rule"). In addition to these stringent numerical emission standards, CARB's Urban Transit Bus Rule contains purchase requirements for so-called "fleet operators" which are like the purchase requirements found in the Fleet Rules. *Id.* § 1956.2. However, in contrast to the Urban Transit Bus Rule, the Fleet Rules do not require manufacturers to *produce* new transit buses and engines that meet strict, numerical emission "standards."

**C. The Challenged Fleet Rules.**

Pursuant to California state law, Respondent South Coast Air Quality Management District in 2000 adopted six rules governing the purchase and acquisition of vehicles by certain fleet operators. Pet. App. at 15a-16a. These Fleet Rules apply to fleets of fifteen or more urban buses, garbage trucks, airport transit vehicles, and street sweepers, among others. Pet. App. at 16a-19a. Generally, the Fleet Rules require fleet operators to acquire vehicles that either (1) are classified under CARB's regulations as a "low emission" or cleaner vehicle, or (2) operate on an alternative fuel. *Id.* Vehicles complying with these rules are already being made and are available for sale in California.

Significantly, the six Fleet Rules do not require manufacturers to make any vehicle that they are not otherwise manufacturing. Indeed, the Fleet Rules impose no requirements whatsoever on manufacturers. Also, each of the Fleet Rules contains an exception that allows fleet operators to purchase "higher emission" or diesel vehicles in the event that no certified alternative fuel vehicle exists for a particular application. *Id.* Thus, if manufacturers choose not to make a



particular CARB-certified clean vehicle, the Fleet Rules do not require its purchase.

**D. The Rulings Below.**

Petitioners challenged the Fleet Rules, claiming that Section 209 of the CAA preempts them. Pet. App. at 19a. The district court rejected Petitioners' claim, holding that the Fleet Rules "do not constitute unlawful standards 'relating to the control of emissions'" (Pet. App. at 24a) and are not preempted by § 209(a) of the CAA. Pet. App. at 27a. Contrary to Petitioners' assertion (Pet. App. at 3), the district court did not rest its decision on a "semantic distinction" between a purchase and a sale. Rather, the district court carefully reasoned as follows:

> The Fleet Rules accept as given the existing CARB vehicle standards; they merely require fleet operators to choose from among the least polluting of CARB-certified, available vehicles. The Rules impose no new emission requirements on manufacturers whatsoever, and therefore do not run afoul of Congress's purpose behind motor vehicle preemption: namely, the protection of manufacturers against having to build engines in compliance with a multiplicity of standards.

Pet. App. at 21a.

The court of appeals affirmed the district court's holding in a one-page decision which stated, "We affirm the decision of the district court for the reasons stated in its well-reasoned opinion. . . ." Pet. App. at 2a. Thereafter, the panel voted unanimously to deny the petition for rehearing, and no

member of the panel voted in favor of rehearing the matter *en banc*. Pet. App. 28a-29a. Moreover, no active judge in the circuit requested a vote on whether to rehear the matter *en banc*. *Id.*

## REASONS FOR DENYING THE WRIT

### I. THE "CIRCUIT SPLIT" POSITED BY PETITIONERS DOES NOT EXIST.

Attempting to attract this Court's attention, Petitioners have invented a nonexistent conflict between the decision of the court of appeals below and two other circuit court cases: *Association of Int'l Auto. Mfrs. v. Commissioner*, 208 F.3d 1 (1st Cir. 2000) ("AIAM"), and *American Auto. Mfrs. Ass'n v. Cahill*, 152 F.3d 196 (2d Cir. 1998). Pet. at 10-18. Petitioners create this alleged conflict by omitting key facts about the rules at issue in those decisions. When those omitted facts are supplied, it is apparent that the district court and the court of appeals properly concluded that neither decision controls the present case.

Most importantly, Petitioners are demonstrably wrong in asserting that these cases hold that CAA Section 209 preempts all state or local regulations whose purpose is "to effect a general reduction in emissions." Pet. at 10. The cases do not so hold, nor could they, given (1) the CAA's express declaration that states and local governments retain broad power to regulate air pollution (CAA § 116, 42 U.S.C. § 7416), and (2) the clear authorization in Section 246 for states to adopt clean-fuel vehicle rules (CAA § 246, 42 U.S.C. § 7586). Instead, these cases hold only that the CAA preempts state regulations requiring manufacturers to *produce and sell* new vehicles meeting emissions standards established by states other than California.



In *Cahill*, the Court addressed New York's attempts under CAA Section 177 to "opt-in" to the set of 1990 California vehicle regulations that included a zero emission vehicle ("ZEV") sales requirement. 152 F.3d at 199. The ZEV requirement mandated that, for certain model years, a percentage of all new vehicles produced and sold by manufacturers must be ZEVs. An earlier appellate decision held that New York had legally "opted-in" to the California standards. *Motor Vehicle Mfrs. Ass'n v. New York State Dep't of Envtl. Conservation*, 17 F.3d 521, 533 (2d Cir. 1994). Subsequently, however, California abandoned its ZEV sales requirement for four model years, replacing the requirement with voluntary agreements with manufacturers. *Cahill*, 152 F.3d at 199.

The manufacturers then renewed their challenge to the New York vehicle regulations, claiming that the New York standards were no longer "identical" to those in California and thus no longer satisfied the "opt-in" provisions of Section 177. *Id.* New York responded by arguing that its ZEV requirement was not a preempted "standard relating to the control of emissions," but merely an "enforcement procedure." *Id.* The Second Circuit disagreed with New York, finding that because California's standards no longer mandated ZEV production, the New York regulation would require manufacturers to make a new "non-California," "non-federal" vehicle—in other words, a "third vehicle." *Id.* at 201. Thus, according to the *Cahill* Court, the New York regulation was a "standard" under Section 209(a). *Id.* at 200. As the Second Circuit explained:

> If other states may adopt a "California standard" that is not in force in California, the consequences will be wholly at odds with congressional intent.

> First, . . . the Manufacturers . . . might have to produce vehicles meeting the requirements of a single, much smaller state. Second, the Manufacturers might be required to comply with more than two–perhaps several–sets of emissions regulations. . . .

*Id.* at 201.

The Fleet Rules impose no such requirement—or any regulatory requirement whatsoever—upon vehicle manufacturers. They merely require fleet operators to purchase one of the cleaner models from among those motor vehicles *already certified by CARB for production in California*. Pet. App. at 21a-23a. Thus, as the lower courts found in the present case, *Cahill* is plainly distinguishable because it concerned a production and sales requirement, not a purchase restriction like the one in the Fleet Rules. Pet. App. at 22a-23a.

The second principal case cited by Petitioners, *AIAM*, raised a similar issue. Like New York, Massachusetts had "opted-in" to the 1990 California vehicle program, which included the ZEV sales requirement. *AIAM*, 208 F.3d at 3. However, California thereafter dropped the ZEV sales requirement and replaced it with non-regulatory "memoranda of agreement" between CARB and the vehicle manufacturers. *Id.* To avoid violating Section 209, Massachusetts then amended its ZEV sales requirement to incorporate those California memoranda of agreement. *Id.*

Following *Cahill*, the First Circuit found that the Massachusetts ZEV sales requirement was a preempted



"standard" under Section 209 precisely because it was a production requirement. *Id.* at 6. The court explained:

> 'Setting the link between the emission limit and the applicability of the limit to a particular number of vehicles is an inherent part of the standard setting process . . . If a *production requirement*, such as the ZEV mandate, is not considered part of the standard itself, then the compliance with a standard . . . would be disconnected from the obligation to build cars to meet the standard.'

*Id.* (quoting a federal EPA opinion letter) (emphasis added).

Unlike the ZEV requirements at issue in *AIAM* and *Cahill*, the Fleet Rules are not, in the words of the *AIAM* Court, a "production requirement" imposed directly on manufacturers. Whereas the regulations at issue in *AIAM* and *Cahill* directly commanded manufacturers to make vehicles meeting the ZEV standard, the Fleet Rules do not even regulate manufacturers, much less require them to make a new vehicle. As a result, both *AIAM* and *Cahill* are readily distinguishable from the present case.

In sum, the two cases cited by Petitioners do not even conceivably create a conflict in the opinions of the circuit courts of appeals.

## II. THE LOWER COURTS' DECISIONS STRICTLY ADHERE TO THIS COURT'S WELL-ESTABLISHED PREEMPTION JURISPRUDENCE.

Next, Petitioners incorrectly claim that the lower courts' decisions conflict with this Court's "well-established jurisprudence" relating to preemption. Pet. at 18-19. Contrary to Petitioners' assertion, this Court has never held that preemption under Section 209(a) is "expansive." Rather, as the lower courts here properly recognized, the Court has made clear that preemption provisions must be narrowly and strictly construed, particularly where such provisions may infringe upon a state or local government's exercise of traditional police powers. Pet. App. at 7a-10a (quoting, e.g., *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 654 (1995) ("we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law"); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

Control of air pollution has long been a subject of the state and local police power. As this Court recognized over four decades ago, "Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power." *Huron Portland Cement Co. v. City of Detroit, Michigan*, 362 U.S. 440, 442 (1960). Moreover, in enacting the CAA, Congress made clear its intent to preserve this traditional authority for state and local governments. *See, e.g., Washington v. General Motor Corp.*, 406 U.S. 109, 114 (1972) (Congress finds that



"'the prevention and control of air pollution at its source is the primary responsibility of States and local governments'") (quoting predecessor to 42 U.S.C. § 7401); *see also* 42 U.S.C. § 7401(a) (same). Thus, in the present case, the district court and court of appeals properly followed this Court's jurisprudence in placing the "considerable burden" on Petitioners to prove that Congress's intent to preempt the Fleet Rules was "clear and manifest." *De Buono v. NYSA-ILA Medical and Clinical Servs. Fund*, 520 U.S. 806, 814 (1997); *Rice*, 331 U.S. at 230. Carefully considering the purpose of the CAA as well as its text, the lower courts properly found no preemption.

Petitioners now cite a single decision of this Court to claim a "consistency of holdings" that CAA preemption is broad. Pet. at 18-19 (citing *Washington v. General Motors Corp., supra*). In fact, the decision in *Washington* supports Respondents' position that preemption is narrow. The issue in *Washington* was whether this Court should exercise its original jurisdiction over that case. Because the case involved issues of air pollution, which "must be considered in the context of localized situations," the Court declined jurisdiction, thus affirming the importance of state and local control over air pollution. 406 U.S. at 116. The Court mentioned Section 209(a) only in passing, recognizing it as one of the limited exceptions to state and local regulatory control.[3] *Id.* at 114. In the present case, however, no one disputes that Section 209(a) preempts *certain* state and local actions. Rather, the issue here is whether the Fleet Rules fall within Section 209 preemption. The *Washington* decision did not address that issue, let alone hold that Section 209(a) should be construed broadly, as Petitioners now imply.

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3. *Washington* concerned the predecessor statute to the Act.

Nor do the lower courts' opinions in the present case "flatly conflict" with this Court's preemption decisions interpreting statutes that contain the phrase "relating to." Pet. at 19-20. While Petitioners claim that *Morales v. Trans World Airlines, Inc.*, *supra*, dictates a broadly preemptive reading of this phrase (Pet. at 19), Petitioners conveniently ignore the line of post-*Morales* cases in which this Court all but abandoned its focus on the "relating to" language. *See, e.g.*, *Travelers*, 514 U.S. at 655 ("If 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for really, universally, relations stop nowhere.") (internal quotations omitted); *California Div. of Labor Standards Enforcement v. Dillingham Constr. N.A., Inc.*, 519 U.S. 316, 325 (1997) ("an uncritical literalism" in applying the "relates to" language "offer[s] scant utility in determining Congress' intent") (citing *Travelers*, 514 U.S. at 656). As Justice Scalia, the author of *Morales*, explained in *Dillingham*, "applying the 'relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else." 519 U.S. at 335 (Scalia, J., concurring).[4]

4. Even if *Morales* were applied here, it would not support a finding of preemption. The preemption provision at issue in *Morales* was much broader than CAA Section 209(a). It prohibited not only "standards" but also any "law, rule, regulation, standard, *or other provision having the force and effect of law* relating to" the preempted subject matter. *Morales*, 504 U.S. at 383 (emphasis added). By contrast, Congress explicitly limited the scope of Section 209(a) preemption to "standards" relating to the control of emissions. Thus, it is the meaning of the word "standards," not the term "relating to," that is central to this case.

Petitioners also append and rely on the Amicus Curiae brief of the United States in *Central Valley Chrysler-Plymouth, Inc. v. Michael* (Cont'd)



The post-*Morales* cases instead start from the strong presumption that Congress did not intend to preempt state law. They then focus on Congress's intent, as expressed by both the language and objectives of the statute as a whole, to determine the scope of preemption. *See, e.g.*, *De Buono*, 520 U.S. at 814; *Travelers*, 514 U.S. at 654-55; *Dillingham*, 519 U.S. at 325, 329. Far from taking what Petitioners claim is a "freewheeling" approach to preemption (Pet. at 19-20), the district court and court of appeals below carefully and properly applied these factors to hold that the clean-fuel vehicle purchase requirements of the Fleet Rules are not preempted. Pet. App. at 20a-24a.

## III. THE LOWER COURTS' DECISIONS PRESENT NO ISSUE OF NATIONAL IMPORTANCE.

Contrary to Petitioners' position, not every case involving possible preemption presents an issue of national importance appropriate for review by this Court. Petitioners argue that the Ninth Circuit's holding would create national "chaos" in vehicle manufacturing by encouraging the adoption of a

(Cont'd)
*P. Kenny*, No. 02-16395 (9th Cir.), to argue that *Morales* applies here. However, the *Central Valley* case is not even about the CAA; rather, it concerns preemption under the Energy Policy and Conservation Act, 42 U.S.C. § 32901, *et seq.* Moreover, like the preemption provision at issue in *Morales*, that statute more broadly preempts any "law or regulation." While Petitioners apparently have appended this brief solely to imply that the United States agrees with their position, the United States chose not to file a brief in either the district court or the court of appeals below. In short, the *Central Valley* case, and the United States' position in that case, is irrelevant to the present petition.

multitude of "emission requirements" throughout the country. Pet. at 21-22. However, the Fleet Rules plainly do not run afoul of Congress's intent in enacting Section 209(a), which, as the lower courts correctly held, is "the protection of manufacturers against having to build engines in compliance with a multiplicity of standards." Pet. App. at 21a. Thus, purchase requirements like the Fleet Rules do not create emission standards under Section 209(a). Pet. App. at 21a-24a.

Furthermore, Petitioners' hyperbole about "chaos" overlooks the fact that, as discussed above, Congress not only foresaw purchase restrictions like these, it affirmatively authorized them. CAA § 246, 42 U.S.C. § 7586. As the district court astutely observed, "It is not rational to conclude that the CAA would authorize purchasing restrictions on the one hand, and prohibit them, as a prohibited adoption of a 'standard,' on the other." Pet. App. at 23a. Nor does Petitioners' complaint that "every state" will now adopt its own "unique" versions of the fleet rules (Pet. at 21-22) bear any relation to reality. While the Fleet Rules have been in place for nearly three years, no other state or local government has adopted similar regulations.[5]

Finally, and most remarkably, Petitioners profess concern that state and local governments will "require the purchase of the *highest emitting* certified vehicles" as a result of the decision. Pet. at 23 (emphasis added). Petitioners need not worry. In upholding the Fleet Rules, the district court and

5. As noted above, even if every state did adopt its own version of the Fleet Rules, this adoption still would not undermine Congress's preemptive intent. If Petitioners wish to change the law to protect themselves from burdens indirectly resulting from such regulations, their remedy lies with Congress, not with this Court.



Ninth Circuit emphasized that the core purpose of the CAA is to *reduce* air pollution. Pet. App. at 10a. Accordingly, the lower courts' rulings in the present case would not support a hypothetical regulation that increases pollution, as such a regulation would undermine, rather than further, this core purpose. In any event, neither of Petitioners' unrealistic hypothetical scenarios—multiple fleet rules or a rule mandating dirtier vehicles—is before this Court.

## CONCLUSION

Because the lower courts' opinions are consistent with this Court's precedent on preemption and do not create a split among the circuits, Respondents respectfully request that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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Supreme Court, U.S.
FILED
APR 23 2003
CLERK

No. 02-1343

IN THE

# Supreme Court of the United States

ENGINE MANUFACTURERS ASSOCIATION AND WESTERN STATES PETROLEUM ASSOCIATION,

*Petitioners*,

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, *et al.*,

*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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IN THE

# Supreme Court of the United States

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**No. 02-1343**

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ENGINE MANUFACTURERS ASSOCIATION AND WESTERN STATES PETROLEUM ASSOCIATION,

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v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, *et al.*,

*Respondents*.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## REPLY BRIEF FOR PETITIONERS

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## INTRODUCTION

Petitioners Engine Manufacturers Association and the Western States Petroleum Association hereby respectfully submit this Reply Brief in support of the pending petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## I. THE CONFLICT WITH THE FIRST AND SECOND CIRCUIT DECISIONS IS REAL.

Respondent's brief in opposition attempts to obscure the conflict between the Ninth Circuit's decision in this case and the decisions in the First and Second Circuits by disregarding the major premise of both of the latter decisions. Respondent

describes the cases as though the sole question in each was whether the challenged state regulations qualified for the "opt-in" waiver of preemption granted by Section 177 of the Clean Air Act (42 U.S.C. § 7507). *See* Opp. Br. 9, 10. That is an incorrect account of the decisions. Before reaching the Section 177 question, the court in each case determined that the regulations were covered by the preemption language of Section 209(a) (42 U.S.C. § 7543(a)). That determination was essential to the decision reached in each case, because if the regulations were not covered by Section 209(a) in the first place, they would have been permissible despite their failure to comply with Section 177.

The Second Circuit's opinion said, "We first address the question left open in *MVMA III*, 17 F.3d at 536, namely, whether the ZEV requirement is a 'standard relating to the control of emissions' and therefore within Section 209's preemptive scope." *American Auto. Mfrs. Ass'n* v. *Cahill*, 152 F.3d 196, 199 (2d Cir. 1998). The court's holding on this point was: "We agree with the Manufacturers that the ZEV sales requirement is a 'standard relating to the control of emissions' and is therefore preempted by Section 209 of the Clean Air Act." *Id.* at 197.

Similarly, the First Circuit's opinion first considered, as a distinct point, whether the Massachusetts regulations were standards within the meaning of Section 209 (and the identical language of Section 177) and said, "We share the opinion of the Court of Appeals for the Second Circuit that 'the ZEV sales requirement must be considered a standard 'relating to the control of emissions.' " *Association of Int'l Auto. Mfrs.* v. *Commissioner, Massachusetts Dep't of Envtl. Protection*, 208 F.3d 1, 6 (lst Cir. 2000).

The Second Circuit's interpretation of the preemption language of Section 209 was clear and simple: "We view 'standards relating to the control of emissions' as describing regulatory measures intended to lower the level of auto



emissions." 152 F.3d at 200. It held the ZEV regulations preempted because "a requirement that a particular percentage of vehicle sales be ZEVs has no purpose other than to effect a general reduction in emissions." *Ibid.* The First Circuit echoed the test: "[T]he very purpose and effect of the ZEV mandates is to effect a quantitative reduction in emissions. * * * As such, they fall squarely within the language of §§ 209 and 177." 208 F.3d at 7.

The language from the Second Circuit opinion quoted by Respondent at pp. 9-10 of its brief was used by the Second Circuit, not in defining the scope of Section 209, but in explaining why compliance with the opt-in provisions of Section 177 necessitates strict identity with the "California standards." 152 F.3d at 201. Those observations did not limit or qualify the court's broad view of the preemption provision.

Nor did the First Circuit suggest that only a "production" requirement is preempted by Section 209, as Respondent attempts to suggest. *See* Opp. Br. 11. To the contrary, the EPA letter quoted by the court as supporting its conclusion correctly noted that a production requirement must be considered part of the "standard-setting process," not that a "production requirement" is the only kind of regulation that falls within the preemptive reach of Section 209.

The Ninth Circuit's decision in this case cannot be reconciled with the interpretation of Section 209 adopted by the First and Second Circuits. The cases are "distinguishable" only in the sense that any two cases with any different facts are said by lawyers to be "distinguishable." There is no sensible reasoning that will harmonize the rationale and result of the Ninth Circuit decision with the rationale and result of the other two decisions.

There can be no doubt that the "very purpose and effect" of the Fleet Rules is to "effect a quantitative reduction in emissions" within the District. The District Court opinion

adopted by the Ninth Circuit did not deny (and could not have denied) that the Fleet Rules have such a purpose and effect. Instead, the court adopted a mechanistic test for deciding whether regulations are "standards relating to the control of emissions"—namely, if the regulations take the form of restrictions on "purchases" rather than on "sales" or "manufacture" there is no preemption. This means that if New York or Massachusetts, instead of requiring the sale of a certain percentage of ZEV vehicles, had forbidden the *purchase* of any vehicles *other than* LEV vehicles, their regulations would not be preempted. It cannot reasonably be doubted, however, that any such regulations would be held to be preempted under the *Cahill* and *Commissioner* decisions.

The scope of Section 209's preemption may or may not be adequately delimited by the First and Second Circuit opinions, but there is certainly a genuine conflict between those cases and the decision of the Ninth Circuit. The divergence is so striking that it calls strongly for resolution by this Court. As long as the Ninth Circuit decision stands, it is an invitation to other States, and to local government entities everywhere, to adopt whatever emission-control standards they choose, provided they take the form of restrictions on the types of vehicles and vehicle engines that may be purchased.

## II. THE DECISION BELOW FAILS TO FOLLOW THIS COURT'S ADMONITIONS THAT PREEMPTION ANALYSIS MUST FOCUS FIRST ON "THE PLAIN WORDING" OF AN EXPRESS PREEMPTION CLAUSE.

This Court has repeatedly emphasized that when a federal statute contains an express preemption clause, interpretation "must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993); *Sprietsma* v. *Mercury Marine*, ___ U.S. ___, 123 S. Ct. 518, 526 (2002). The



opinion below disregards that principle by failing to give any effect to the phrase "relating to the control of emissions" in the express preemption clause that governs this case. In effect the court has said that the Fleet Rules are not preempted because they do not constitute an "emission standard." But if Congress had meant to limit the preemption solely to "emission standards," it would no doubt have said simply that no state shall adopt "emission standards." Instead it said that no state shall adopt any standard "relating to the control of emissions," by which it could only have meant to preempt some types of emission-control regulations that are not themselves "emission standards." The opinion below fails to acknowledge this "plain wording" of the preemption clause or to offer any explanation why that language does not encompass the Fleet Rules.

Respondent seems to suggest that the phrase "relating to" should be ignored. But this Court's decisions do not permit reading the phrase out of the statute. They acknowledge that the phrase, if taken literally, could extend without limit, but they do not say it means nothing. In the *Dillingham* case, on which Respondent relies, the Court reiterated its long line of cases recognizing that the preemption clause of ERISA is "clearly expansive," has "a broad scope" and "an expansive sweep," and is "conspicuous for its breadth." *California Div. of Labor Standards Enforcement* v. *Dillingham*, 519 U.S. 316, 324 (1997). The Court then restated the narrowing construction that previous decisions had placed on the "expansive sweep" of the clause's language, and applied it to the specific case before the Court. Nor did Justice Scalia's concurring opinion suggest that the preemption clause was to be read as though the language "relating to" had been left out of the clause; rather, the language preceded by "relating to" was to be taken as identifying the field in which ordinary preemption operates. *See* 519 U.S. at 336. The opinion of the Ninth Circuit in this case comports with neither the

majority nor the concurring opinion's approach in the *Dillingham* case.

Respondent also repeats the District Court's erroneous reliance on Section 246 of the Clean Air Act, 42 U.S.C. § 7586, as limiting the scope of the preemption clause of Section 209(a). *See* Opp. Br. 16. The significance of Section 246 is just the opposite. By imposing a *federal* requirement of fleet-purchase regulations, conforming to all the specifications of Section 246 and subject to approval by federal authority, Congress clearly showed that it regarded such regulations as within the scope of the kinds of emission control reserved for determination on a national basis. Indeed, the requirements prescribed by Congress in Section 246 included the requirement that such a fleet-purchase plan must leave the choice of clean-fuel vehicles to the fleet operator, a requirement that is squarely violated by the Fleet Rules at issue in this case. *See* 42 U.S.C. § 7586(d). Thus, it is undisputed that the Fleet Rules of the SCAQMD cannot be supported under Section 246. Aside from the fact that they do not conform to the requirements of Section 246, the State of California affirmatively opted out of Section 246, as it was permitted to do with the permission of the federal EPA, which was given. *See* 64 Fed. Reg. 46849 (Aug. 27, 1999). The District Court's fallacious use of Section 246 only illustrates further the extent of its departure from a faithful construction of the preemption clause at issue in this case.

## III. THE CONFLICTING DECISIONS DO PRESENT AN ISSUE OF NATIONAL IMPORTANCE.

Conflicts on questions of preemption are intrinsically important because they deal with difficult questions of allocation of authority between the national and state governments and thus of respect for the Supremacy Clause. The importance of such questions is indicated by the frequency with which this Court has addressed them in recent years. In this



case, however, the intrinsic importance of a preemption issue is heightened by the fact that it affects the division of authority over a major national industry whose operations in interstate commerce constitute a vital part of the economy.

Restrictions on the purchase of particular types of vehicles alter the demand conditions manufacturers face. Changes in demand necessitate changes in production and alter the volume of output for the different types of vehicles and engines a manufacturer produces. Changes in volume affect costs, and therefore prices. It is gross oversimplification to suggest, as the courts below have done, that restrictions on purchasers impose no requirements on manufacturers.

The question raised by this case is whether the broad reservation by Congress of national authority to determine the constraints under which manufacturers must operate for the purpose of controlling emissions may be whittled away by restrictions on "purchases" when similar restrictions on "sales" would undoubtedly be forbidden. That is an important question.

## CONCLUSION

For the foregoing reasons, and for those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED
APR 11 2003
CLERK

(2)

No. 02-1343

IN THE
# Supreme Court of the United States
OCTOBER TERM, 2002

ENGINE MANUFACTURERS ASSOCIATION AND
WESTERN STATES PETROLEUM ASSOCIATION,

*Petitioners,*

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, ET AL.,

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## UNOPPOSED BRIEF OF *AMICI CURIAE* ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC., ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, INC. AND TRUCK MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITION FILED BY ENGINE MANUFACTURERS ASSOCIATION AND WESTERN STATES PETROLEUM ASSOCIATION

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## QUESTION PRESENTED

Whether section 209 of the Clean Air Act, 42 U.S.C. § 7543, which prohibits political subdivisions of states from regulating emissions from new motor vehicles, is violated by local regulations dictating the emission level of vehicles that may be purchased by private fleet owners.

## RULE 29.6 STATEMENT

Pursuant to S. Ct. Rule 29.6, *amicus* The Alliance of Automobile Manufacturers, Inc. ("the Alliance") is a nonprofit trade association of car and light-truck manufacturers. The Alliance has no parent company, subsidiaries or affiliates that have issued shares to the public.

The Association of International Automobile Manufacturers, Inc. ("AIAM") is a nonprofit trade association of manufacturers, manufacturer-authorized importers and distributors of motor vehicles. AIAM has no parent company, subsidiaries or affiliates that have issued shares to the public.

The Truck Manufacturers Association ("TMA") is a not-for-profit trade association representing major medium- and heavy-duty truck manufacturers. TMA has no parent company, subsidiaries or affiliates that have issued shares to the public.



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## INTEREST OF *AMICI*

*Amici* Alliance of Automobile Manufacturers, Inc., Association of International Automobile Manufacturers Inc., and Truck Manufacturers Association seek leave to file this brief in support of Petitioners and in support of reversing the decision of the district court.[1] *Amici*'s members manufacture or distribute virtually all automobiles and trucks that are sold in the United States. For more than two decades the sale of these new motor vehicles has been subject to federal air pollution control regulations and, within the State of California, to emissions rules adopted and enforced by the California Air Resources Board.

The federal and California vehicle emissions control requirements for new motor vehicles were adopted and enforced under the provisions of Title II of the Clean Air Act ("CAA") which preempts any other emission-related regulation of new vehicles by other authorities. *Amici* and their members have a vital interest in the proper enforcement of the preemption provisions of the CAA applicable to the purchase and sale of new motor vehicles. The federal district court's decision in this case represents a dramatic and inappropriate departure from long-standing interpretations of the CAA. If allowed to stand, the decision will disrupt the statutory framework of the CAA and will substantially adversely affect the *amici*'s members nationwide.

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[1] The parties have consented to the filing of this brief in letters that are on file in the Clerk's office. The preparation of this brief was entirely funded by the Alliance, AIAM and TMA, and the brief was drafted by their counsel. S. Ct. R. 37.6.

## SUMMARY OF THE CONTROVERSY

On June 16, 2000, August 18, 2000, and October 20, 2000, California's South Coast Air Quality Management District ("SCAQMD" or "management district") adopted six rules known as the "Fleet Rules." SCAQMD is one of thirty-five local air pollution control agencies of the State of California, established under the California Health and Safety Code §§ 40410, 40412, whose jurisdiction is the Los Angeles metropolitan area and whose powers include the right to adopt rules that are not in conflict with state and federal law. *See* Cal. Health & Safety Code § 40440. The Fleet Rules mandate that certain public and private fleet operators acquire only certain types of vehicles as specified by SCAQMD when replacing their fleet vehicles. The approved vehicles must be certified to the most stringent categories of California emissions standards. Thus, some fleet owners in the SCAQMD are prohibited from purchasing various vehicles manufactured by *amici*'s members that are approved for sale in California. Three of the rules apply only to public fleet operators; three apply to both public and private fleet operators. These regulations seek to have fleet operators purchase only alternative-fuel vehicles, which is defined to mean only those using engines powered by compressed or liquefied natural gas, liquefied petroleum gas (propane), methanol, electricity, or fuel cells.[2] Hybrid-electric and dual-fuel vehicles that use diesel fuel may not be purchased.

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[2] Fleet Rule 1193 applies to public and private solid waste collection fleets with 15 or more vehicles. Fleet Rule 1194 applies to public and private fleet operators with 15 or more vehicles used to transport passengers from commercial airports located in SCAQMD's jurisdiction. Fleet Rule 1186.1 applies to public and private sweeper fleet operators having 15 or more vehicles.



The petitioners for *certiorari* challenged the Fleet Rules in the United States District Court for the Central District of California. The court in *Engine Manufacturers Ass'n v. South Coast Air Quality Management District,* 158 F. Supp. 2d 1107 (C.D. Cal. 2001) ("*EMA*"), upheld the Fleet Rules because they were a restriction on the purchase and lease, not a restriction on the sale of vehicles by fleet operators. *Id.* at 1117. The court held that the Fleet Rules do not set a standard relating to the control of emissions, which would violate the CAA's section 209 preemption provision, because they do not impose any numerical control on new vehicles, but merely regulate which previously certified vehicles may be purchased. *Id.* The case was appealed to the U.S. Court of Appeals for the Ninth Circuit, which summarily affirmed the district court without elaboration. *Engine Mfrs. Ass'n v. South Coast Air Quality Management District*, 309 F.3d 550 (9th Cir. 2002).

## SUMMARY OF *AMICI CURIAE*'S ARGUMENT

The effect of these rules is to change more than three decades of mobile source air pollution law. Since 1967 the CAA has limited imposition of new motor vehicle emissions standards to federal standards or, since 1970, to California state standards approved by the U.S. Environmental Protection Agency ("EPA"). *See* Air Quality Act of 1967, Pub. L. No. 90-148, § 208, 81 Stat. 485, now codified at CAA § 209, 42 U.S.C. § 7543.[3] The policy behind these requirements is described in *California ex rel. Air Resources Board v. Department of Navy,* 431 F. Supp. 1271, 1285 (N.D. Cal. 1977), *aff'd*, 624 F.2d 885 (9th Cir. 1980). There the court held that

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[3] *See generally* Arnold W. Reitze, Jr., *Mobile Source Air Pollution Control*, 6 ENVTL. LAW. 309 (2000).

> The reasons given for the enactment of the [CAA's motor vehicle] preemption provision can be summarized as follows: to protect the manufacturer against having to build engines which would comply with a multiplicity of standards; to protect the vehicle owner from having to deal with different standards in each state in which he drives; to avoid the unnecessary duplication of federal standards; to avoid 'unnecessary expense' to the owner; and generally to avoid 'chaos' and 'confusion.'

*Id.* (internal quotation and citation omitted). The Fleet Rules create the very conditions the preemption policy was designed to prevent.

The position of the *amici curiae* is that the district court's opinion makes the preemption provision of the CAA meaningless. The whole purpose of the preemption language is to keep political subdivisions of states out of the business of regulating emissions from new motor vehicles. The district court's opinion relies on the fictional premise that restrictions on what buyers may purchase do not restrict what manufacturers may produce, a premise that ignores common sense and misreads the law. If the CAA's preemption provision can be evaded by using local regulation banning the purchase of vehicles not meeting "local requirements," there is no effective federal preemption of new motor vehicle emission standards. The door will be opened to a plethora of new vehicle emission regulations by local governments.

## THE CLEAN AIR ACT

Under the CAA, new motor vehicles and new motor vehicle engines are subject to a comprehensive program to reduce emissions through technological improvements. *See* CAA §§ 202, 206. Federal law preempts state or local control of new motor vehicles. Section 209(a), 42 U.S.C. § 7543(a), provides "No State or any **political subdivision** thereof shall adopt or attempt to enforce any standard



**relating** to the control of emissions from new motor vehicles...." (Emphasis added.)

The only exception to the preemption provision described above is found in section 209(b), 42 U.S.C. § 7543(b). This section provides a waiver for the State of California that allows the State to set its own standards as long as the standards are at least as strict as the federal standards and they are approved by the Administrator of EPA as meeting the statutory requirements. After a waiver is granted, compliance with the California standards is considered to be compliance with the federal standards.

California responded to section 209(b) when its California Air Resources Board ("CARB") enacted two motor vehicle emissions regulations. The first regulation applies to passenger cars and medium-duty vehicles (including some diesel-fueled vehicles) and is known as the Low Emissions Vehicle ("LEV") Program. It creates four tiers of increasingly stringent emission standards: (1) transitional low-emission vehicles ("TLEVs"); (2) low-emission vehicles ("LEVs"); (3) ultra-low-emission vehicles ("ULEVs"); and (4) zero-emission vehicles ("ZEVs").[4] The average emissions from the mix of vehicles in the four tiers must meet the overall "fleet average" required for a specified year. Manufacturers that perform better than the fleet average earn credits that may be marketed. Over time, a progressively cleaner mix of vehicles must be sold. CARB's second regulation is its Urban Bus Program. CARB permits bus operators to select one of two compliance paths when purchasing new buses: (1) a diesel path or (2) an alternative fuel path.

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[4] *See* Arnold W. Reitze, Jr., AIR POLLUTION CONTROL LAW: COMPLIANCE AND ENFORCEMENT 308 (2001).

The management district's Fleet Rules differ from the state's regulations because the Fleet Rules allow the purchase of only a subset of the LEVs or ULEVs, or the purchase of alternative-fueled vehicles that are designated by the SCAQMD. CARB-certified diesel-fueled engines may not be purchased. SCAQMD's Rule 1192 does not give transit vehicle operators the option to purchase clean diesels, thereby taking away the state's "diesel path" and forcing fleet owners down the "alternative fuel path." In short, many vehicles certified to meet all of California's emission requirements are unable to be purchased by fleet operators within the management district, because SCAQMD's Fleet Rules regulate emissions of fleet vehicles.

This SCAQMD approach flies in the face of the preemption language of section 209(a), as we will discuss in more detail below. It is also inconsistent with the federal policy expressed in section 177 of the CAA, 42 U.S.C. § 7507. Section 177 provides states with a nonattainment area the option to adopt, in their SIP, the California standards for which an EPA waiver has been granted. Any California standard adopted by another state must be adopted in its entirety. It must be identical to the California standard and must provide at least two years, prior to the model year to which it first applies, for the manufacturers to comply. In 1990 Congress amended section 177 to make it clear that no state adopting California standards may "prohibit or limit, directly or indirectly, the manufacture or sale of a new motor vehicle ... that is certified in California as meeting California standards." Thus, while no sovereign state is allowed to impose standards that differ from the applicable federal or California standard, the Ninth Circuit would not so constrain the management district.[5]

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[5]Section 246(a), 42 U.S.C. § 7586(a), requires states with populations of 250,000 or more in a serious or worse ozone nonattainment area (and in (Continued...)



Section 209(d), 42 U.S.C. § 7543(d), provides, "Nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles." This section was intended to make it clear that state and local governments maintain their traditional control over in-use vehicle operation. As we will explain in detail, the Fleet Rules impose prohibited controls on new motor vehicles and are not the type of regulations that may be imposed by section 209(d).

## I. THE DISTRICT COURT'S DECISION CONFLICTS WITH PRIOR DECISIONS OF THE SECOND AND FIRST CIRCUITS; THE FLEET RULES VIOLATE THE PREEMPTION PROVISIONS OF SECTION 209.

Section 209(a), 42 U.S.C. § 7543(a), requires states or their political subdivisions not to adopt or attempt to enforce "any standard relating to the control of emissions from new motor vehicles." Unlike the Ninth Circuit, the First and Second Circuits have held that the use of the word "relating" indicates standards are to be interpreted broadly. The Second Circuit in *American Automobile Manufacturers Ass'n v. Cahill,* 152 F.3d 196 (1998), held that New York's

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certain carbon monoxide nonattainment areas) to establish a clean-fuel vehicle program for fleets. However, section 182(c)(4)(A), 42 U.S.C. § 7511a(c)(4)(A) allows a substitute program to be adopted if EPA approves. California opted out of the clean-fuel vehicle program by substituting an LEV program and an Urban Bus Program approved by EPA at 64 Fed. Reg. 46,849 (Aug. 27, 1999). Because California is not participating in the section 246 program, the SCAQCD Fleet Rules cannot be based on that section. If California was using section 246, the definition found in CAA § 241(2), 42 U.S.C. § 7581(2), allows the use of diesel-fueled vehicles, but the use of such vehicles is prohibited by the SCAQMD's Fleet Rules.

"ZEV sales requirement must be considered a standard 'relating to the control of emissions.'" *Id.* at 200. In *Association of International Automobile Manufacturers, Inc. v. Commissioner*, 208 F.3d 1, 6 (2000), the First Circuit held the Massachusetts ZEV requirements were emissions standards. Moreover, the Second Circuit defined a standard relating to the control of emissions as "regulatory measures intended to lower the level of auto emissions." *Cahill*, 152 F.3d at 200. Emissions standards are not limited to quantitative limits on emissions. In both of these cases, the ZEV regulations were held to be standards within the meaning of section 209(a) because they serve no "purpose other than to effect a general reduction in the level of emissions" from new motor vehicles. 152 F.3d at 200; 208 F.3d at 6.

The SCAQMD Fleet Rules clearly "relate to" the "control of emissions from new motor vehicles." Indeed, control of emissions is the entire purpose and effect of the SCAQMD Fleet Rules. *EMA*, 158 F. Supp. 2d at 1114 (noting that Fleet Rules are "an effort to reduce public exposure to motor vehicle pollution"). There can be no doubt that the Fleet Rules are in "connection with" control of emissions, or that their "purpose and effect ... is to effect a quantitative reduction in emissions." *Commissioner*, 208 F.3d at 7. Moreover, SCAQMD can hardly dispute that its Fleet Rules make "reference to" the control of emissions given that they incorporate a subset of vehicles approved by the CARB for purposes of emissions control. The fact that the management district's Rules expressly limit the purchase of vehicles to those that are certified to a subset of the applicable California numerical emission limits, while prohibiting the purchase of vehicles that comply with other valid California and federal emission limits, necessarily means that the Rules are "standards" relating to control of vehicle emissions.



In *EMA*, the district court reasoned that while the state has the sole authority to establish emission standards that apply to the sales of a class of vehicles, a local government may nevertheless prohibit their purchase. This interpretation makes a mockery of section 209's preemption language. The district court's analysis would allow any sales requirement concerning new motor vehicles that is subject to federal preemption to be avoided if the local regulation was drafted to be a ban on the purchase of such vehicles. The Second Circuit's decision in *Cahill* and the First Circuit's decision in *Commissioner* are purportedly distinguished because they involved restrictions on the *sale* of vehicles as opposed to so-called purchase prohibitions. This distinction is semantic nonsense. Every new vehicle transaction involves the purchase of the vehicle by the purchaser and the sale of the vehicle by the seller. Thus, the sale and purchase of a new motor vehicle are two sides of the same coin. One cannot occur without the other, and government cannot regulate one without regulating the other. When Congress preempts emissions-related restrictions on the sale of new motor vehicles, it necessarily preempts emissions-related restrictions on the purchase of new motor vehicles.[6]

Such a distinction leads to absurd results. For example, without purporting to impose any restrictions directly on manufacturers, one local jurisdiction could require twenty percent of its population to purchase liquefied natural gas powered engines and another local jurisdiction could require

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[6] The legislative history of section 209 indicates that Congress intended preemption to protect both vehicle manufacturers and purchasers from confusion and unnecessary burdens. *See* S. Rep. No. 89-192, at 6 (1965) (state and local regulation of vehicle emissions would "result in chaos insofar as manufacturers, dealers, and users are concerned."); *see also Callifornia ex rel. Air Resources Board v. Department of Navy*, 431 F. Supp. 1271, 1285 (N.D. Cal. 1977), *aff'd*, 624 F.2d 885 (9th Cir. 1980) (noting same).

fifty percent of its population to purchase methanol powered engines and ban the purchase of liquefied natural gas engines. This process could play itself out time and again across the country (or among the other thirty-four management districts in California), with each local government establishing a different set of purchase requirements unique to its particular area. It is this possibility that Congress explicitly sought to prevent—"an anarchic patchwork of federal and state regulatory programs...." *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1109 (D.C. Cir. 1979), *cert. denied sub nom. General Motors Corp. v. Costle*, 446 U.S. 952 (1980).

Congress did not limit preemption to restrictions on vehicle "sales." The preemptive reach of section 209(a) covers any "standard" for "new vehicles." Any distinction between sale restrictions and purchase restrictions is irrelevant provided that a purchase restriction is a "standard" relating to control of "new" motor vehicle emissions. Congress intended to preempt comprehensively state and local regulation of emissions from new motor vehicles, while allowing States to play a role in regulating "in-use" emissions *after* the vehicles are in the possession of consumers. *Allway Taxi, Inc. v. City of New York*, 340 F. Supp. 1120, 1124 (S.D.N.Y.), *aff'd*, 468 F.2d 624 (2d Cir. 1972) (section 209(a) preemption does not preclude States or their political subdivisions from regulating "the use or movement of motor vehicles after they have reached their ultimate purchasers"). The explicit statutory distinction between the regulatory power of state and local governments over "new" and "in-use" vehicles was intended to "postpon[e] state regulation so that the burden of compliance will not fall on the manufacturer." *Engine Mfrs. Ass'n v.*



*EPA*, 88 F.3d 1075, 1086 (D.C. Cir. 1996).[7] Because the SCAQMD rules apply to "new" vehicles, they are expressly preempted by section 209(a).[8]

In addition to preempting emission standards, section 209(a) provides no state shall require any other approval relating to the control of emissions from new motor vehicles as a condition precedent to the initial sale, titling or registration of a new motor vehicle. One cannot register a vehicle unless there first has been a sale to the consumer. Such a sale would by its very nature require a purchase. But, if a purchase is made of a vehicle with emissions that do not meet SCAQMD's Fleet Rule, the purchaser—prior to its first registration—may face serious penalties. Section 42400 of the California Health and Safety Code makes any violation of a District Rule a misdemeanor which subjects the violator to a penalty up to $1,000 per day and imprisonment up to six months. If the violation is deemed "knowing," the penalty can be up to $40,000 per day and up to one year in prison. *See* Cal. Health & Safety Code § 42400.2. If the violation is "willful and intentional," the penalty can go to $75,000 per day and result in up to one year in prison. *See id.* § 42400.3. Injunctive relief and administrative penalties also may be used. *See id.* §§ 42400.7 and 42410. Thus, SCAQMD's Fleet Rules impose a clear "condition precedent" to the sale of a motor vehicle and carry substantial penalties for

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[7] The Act defines a "new" motor vehicle as one whose "title has never been transferred to the ultimate purchaser," such as a retail customer or a leasing company. CAA § 216(3), 42 U.S.C. § 7550(3).

[8] Even if the SCAQMD Fleet Rules were not preempted *expressly* by section 209(a), they would still be implicitly preempted, under principles of conflict preemption, because they "prevent or frustrate the accomplishment of a federal objective," *Geier v. Am. Honda Co.*, 529 U.S. 861, 873-74 (2000). For SCAQMD to go outside of the federal approval process frustrates the object of Clean Air Act preemption.

noncompliance, clearly violating the second sentence of section 209(a).

## II. THE FLEET RULES ARE NOT VALID REQUIREMENTS PURSUANT TO SECTION 209(d).

By way of clarifying the preemption provision in section 209(a), section 209(d) makes it clear that states or their political subdivisions retain the right to "otherwise" regulate registered or licensed motor vehicles. The discussion above shows that the Fleet Rules are emission standards and are requirements applicable to new motor vehicles prior to their initial registration. The Fleet Rules are not the kind of rules allowed by section 209(d) to be imposed by political subdivisions of the state.

With respect to vehicle emissions, local governments may have a legitimate role in helping to *enforce* emissions requirements imposed at the state level on in-use vehicles. The most important example of this is the inspection and maintenance program (I/M) required in ozone nonattainment areas by section § 182(b)(4), 42 U.S.C. § 7511a(b)(4).[9] This program has characteristics common to all programs used by states to control emissions from in-use vehicles. It applies to all covered vehicles regardless of the emissions measured as part of the engines original certification, and it applies only

[9] A more stringent enhanced I/M program is required in serious or worse ozone nonattainment areas by section 182(c)(1), 42 U.S.C. § 7511a(c)(1) and in moderate or worse carbon monoxide nonattainment areas with a design value greater than 12.7 parts per million by section 187(a)(6). *See generally* Arnold W. Reitze, Jr., *Federalism and the Inspection and Maintenance Program Under the Clean Air Act*, 28 PAC. L.J. 1461 (1996).



to vehicles that have been purchased and registered to consumers.[10]

An evaluation of the current in-use motor vehicle programs reinforces the conclusion that the Fleet Rules are emission standards that may not be imposed by local governments. Indeed, none of the in-use motor vehicle control programs regulate the purchase or sale of any classes of vehicles based on their potential emissions. A local government prohibition on purchasing certified vehicles is wholly inconsistent with existing in-use programs. SCAQMD's overt attempt to impose emissions-related restrictions on fleet owners prior to vehicle registration violates section 209's preemption provision and the explicit Congressional policy behind it.

[10] Similar coverage of registered vehicles is found in the gasoline vapor recovery requirements of section 182(b)(3), 42 U.S.C. § 7511a(b)(3), transportation controls imposed by section 182(c)(5), 42 U.S.C. § 7511a(c)(5) and the vehicle mile reduction requirements of section 182(d)(1), 42 U.S.C. § 7511a(d)(1). The conformity provisions of section 176(c), 42 U.S.C. § 7506, require transportation plans and programs to be consistent with a transportation emissions budget for the aggregate emissions from motor vehicles in the area covered by the state implementation plan. *See generally* Arnold W. Reitze, Jr., *Transportation-Related Pollution and the Clean Air Act's Conformity Requirements*, 13 NAT. RESOURCES & ENV'T. 406 (1998).

## CONCLUSION

Prohibiting purchases of vehicles whose emissions exceed a certain level is no different in its purpose and effect than prohibiting sales of vehicles whose emissions exceed that same level. The management district's rules prohibiting private parties from purchasing vehicles that can otherwise be lawfully sold in California are preempted by the CAA. The decision below should therefore be reversed.

Respectfully submitted,

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April 11, 2003

Supreme Court, U.S.
FILED
APR 14 2003
OFFICE OF THE CLERK

No. 02-1343

# In the Supreme Court of the United States

ENGINE MANUFACTURERS ASSOCIATION, ET AL.,

*Petitioners,*

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, ET AL.,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., THE AMERICAN ROAD & TRANSPORTATION BUILDERS ASSOCIATION, AND THE TAXICAB, LIMOUSINE & PARATRANSIT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## INTEREST OF THE *AMICI CURIAE*[1]

*Amicus curiae* American Trucking Associations, Inc. (ATA) is a nonprofit corporation organized under the laws of the District of Columbia. ATA is the national trade association of the trucking industry, with more than 2000 direct members. As an umbrella organization for state associations and national trucking conferences, ATA represents tens of thousands of motor carriers and suppliers to motor carriers. ATA regularly advocates the trucking industry's concerns before the courts and federal administrative agencies.

*Amicus curiae* American Road & Transportation Builders Association (ARTBA) is a not-for-profit trade association headquartered in Washington, D.C. ARTBA represents the collective interests of all sectors of the U.S. transportation construction industry in matters before the courts, Congress, the Executive Branch, and administrative agencies. ARTBA acts as an umbrella group for more than 5000 members of the transportation construction industry.

*Amicus curiae* Taxicab, Limousine, & Paratransit Association (TLPA) is a not-for-profit trade organization for the private passenger transportation industry. TLPA's membership includes approximately 1100 taxicab companies, executive sedan and limousine services, airport shuttle fleets, non-emergency medical transportation companies, and paratransit services. TLPA is the primary legislative advocate and education resource for the private ground transportation industry.

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6 of the Rules of this Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

ATA, ARTBA, and TLPA believe that the Ninth Circuit's decision incorrectly decided the issues raised in the petition for certiorari and will cause extraordinary harm if those issues are not addressed by the Court. The Ninth Circuit's decision opens the door to the creation of "patchwork" standards for emissions control by States and their various political subdivisions, in direct contravention of the express preemption of state and local regulation by Section 209(a) of the Clean Air Act, 42 U.S.C. § 7543(a).

Members of ATA, ARTBA, and TLPA will be deeply affected by the Ninth Circuit's failure to overturn the South Coast Air Quality Management District (SCAQMD) standards at issue.

## STATEMENT

Section 209(a) of the Clean Air Act, 42 U.S.C. § 7543(a), provides (emphasis added):

> No State or any political subdivision thereof shall adopt or attempt to enforce *any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines* subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

Notwithstanding Section 209(a), SCAQMD – a political subdivision of the State of California – has enacted six "Fleet Rules," which are restrictions on the choice of vehicles available for fleet operators, including members of *amici* ATA, ARTBA, and TLPA, to purchase or lease. The Fleet Rules all have the stated purpose of "reduc[ing] air toxic and criteria pollutant emissions," *e.g.*, Rule 1186.1, www.aqmd.gov/rules/html/r1186-1.html, and define permissible vehicles for fleet operators to purchase by the use of differing levels of emission-control technologies.



Rule 1186.1 regulates public and private fleets of street sweepers, and requires that covered fleet operators purchase or lease new street sweepers that are powered by alternative fuel sources. See Pet. App. 18a. For a limited time, a fleet operator may also qualify for an exception and be permitted to operate diesel-powered street sweepers fitted with emission-reducing exhaust control devices.

Rule 1191 regulates public fleets of passenger cars, light-duty vehicles, and medium-duty vehicles, and affects public fleet operators within SCAQMD with fleets of 15 or more vehicles. Fleet operators are required to purchase or lease new vehicles from a list, promulgated by the California Air Resources Board (CARB), that includes Low Emission Vehicles (LEV), Ultra Low Emission Vehicles (ULEV), Super-Ultra Low Emission Vehicles (SULEV), or Zero-Emission Vehicles (ZEV). Fleet operators also have the discretion to purchase alternative-fuel vehicles that CARB has certified as meeting, or exceeding, ULEV emissions standards. See Pet. App. 16a.

Rule 1192 applies to public fleets of urban buses with 15 or more vehicles. Except as specifically exempted, fleet operators are required to acquire alternative fuel vehicles that meet emissions requirements spelled out in the California Code of Regulations. See Pet. App. 16a-17a.

Rule 1193 applies to public and private fleets of solid waste collection vehicles with 15 or more vehicles. Except as exempted, fleet operators replacing or adding new vehicles to the fleet must purchase or lease alternative-fuel solid waste collection vehicles. See Pet. App. 17a. Operators of covered fleets with fewer than 50 vehicles may also purchase or lease dual-fuel vehicles that meet CARB emission standards, and within the first year the Rule is in effect operators of larger fleets may also purchase or lease dual-fuel vehicles.

Rule 1194, applying to public and private fleets providing passenger transportation service from commercial airports, requires graduated increases in percentages of the total of new

fleet vehicles purchased or leased to be from the three most stringent categories of LEVs, according to the emissions standards promulgated by CARB. See Pet. App. 17a-18a. New purchases or leases by a fleet operator subject to the Rule must be either ULEVs, SULEVs, or ZEVs.

Rule 1196 applies to public fleets of heavy-duty vehicles, and requires that all new additions to the fleet will be alternative-fuel vehicles, dual-fuel vehicles, gasoline-powered vehicles, or, if the fleet operator can demonstrate the technical infeasibility of the prior three alternatives, a diesel-powered vehicle with an approved control device. See Pet. App. 18a-19a. To qualify for the fourth option, the fleet operator must seek special certification from SCAQMD before purchase or lease of the new diesel-fuel vehicle. Each option under Rule 1196 must meet CARB standards for emissions applicable to the particular type of vehicle.

The SCAQMD Fleet Rules were promulgated without following any procedure provided under the Clean Air Act for receiving a waiver from federal preemption.

As is explained in the petition for a writ of certiorari, petitioners brought suit to enjoin the Fleet Rules on the ground that they are preempted by Section 209(a) of the Clean Air Act. District Judge Florence-Marie Cooper rejected that challenge in its entirety, and the Ninth Circuit affirmed on the basis of the district court's opinion. Taking a non-textual approach to interpretation of Section 209(a) – which preempts *every* "standard relating to the control of emissions" – the courts below attached dispositive significance to the fact that "[t]he Rules regulate the purchasing and leasing, not the sale, of vehicles by fleet operators" (Pet. App. 21a) and "therefore do not run afoul of" what the courts deemed to be "Congress's purpose behind motor vehicle preemption" (*ibid.*). But see Pet. App. 41a (expressing view of the United States that such an approach to construing Section 209(a) is impermissible).



## SUMMARY OF ARGUMENT

Under the Ninth Circuit's ruling, any State or political subdivision of a State can adopt and attempt to enforce standards relating to the control of emissions from new motor vehicles or new motor vehicle engines, in direct derogation of the language and intent of Section 209(a) of the Clean Air Act, as long as the State or political subdivision regulates purchases rather than sales. The language of Section 209(a), the preemption section of Title II of the Clean Air Act, could not be clearer in prohibiting that result. This Court has interpreted identical language to state a broad preemptive purpose. Such broad preemption in this case unquestionably reaches the SCAQMD Fleet Rules. The structure of Section 209, where the preemption section resides, supports the broad interpretation of the section's preemptive scope to reach the SCAQMD Fleet Rules. The language and structure obviate any need to look to the legislative history of Section 209, but that, too, supports the conclusion that the SCAQMD Fleet Rules are a preempted exercise of state regulatory authority.

The Ninth Circuit has in this case introduced confusion into a legislative scheme where none previously existed. Every other circuit to address the issue has understood the breadth of Section 209(a) preemption. District court decisions that have not been subject to appellate review have also reached the correct conclusion. Until Judge Cooper's opinion for the district court, and the Ninth Circuit's affirmance on the basis of that opinion, there was no debate that, except for the State of California – under a limited waiver, not complied with here – States and their political subdivisions could not promulgate separate standards relating to the control of emissions from new motor vehicles and motor vehicle engines. The Ninth Circuit's decision in this case utterly upends the legislative scheme.

The overwhelming national importance of this issue supports a grant of certiorari to resolve the extent of preemption under Section 209(a). The potential effect of allowing the Ninth Circuit's decision to stand is difficult to overstate. Each

individual State or political subdivision of a State within the Ninth Circuit is now free to promulgate its own emissions standards, subject only to the limitation that it apparently may not implement a technology-forcing requirement. *Amici curiae* have large numbers of members that will (if the decision below stands) be forced to incur additional costs to their businesses to comply with the SCAQMD rules, and untold additional costs should the likelihood of subregion-by-subregion regulation come to pass. The Court should take this opportunity to clarify the scope of Section 209(a) preemption.

## ARGUMENT

### I. IN FAILING TO INTERPRET SECTION 209(a) AS PREEMPTING THE SCAQMD FLEET RULES, THE NINTH CIRCUIT CONTRAVENED THE PLAIN AND UNAMBIGUOUS LANGUAGE AND PURPOSE OF THE CLEAN AIR ACT

Judge Cooper's and the Ninth Circuit's interpretation of Section 209(a) reads Congress's unambiguous intent to preempt state and local standards for control of emissions out of the Clean Air Act. The existence and breadth of Congress's preemptive intent when enacting Section 209(a) is not subject to serious debate. Its application to the SCAQMD Fleet Rules is apparent from the language, structure, and legislative history of the Clean Air Act and from a base understanding of the Fleet Rules themselves.

Section 209(a), headed "Prohibition," is the preemption section of Title II of the Clean Air Act, which deals with motor vehicle emissions standards. Section 209(a) states:

> No state or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No state shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.



42 U.S.C. § 7543(a). Section 209(a)'s unambiguous pre-emption of state regulation is reflected in this Court's case law, as well as decisions of lower courts nationwide. See *Washington* v. *General Motors Corp.*, 406 U.S. 109, 114-115 (1972) ("Congress has largely pre-empted the field with regard to 'emissions from new motor vehicles.'") (citing to the former codification of Section 209(a) as 42 U.S.C. §§ 1857f-9 to 1857f-12); see also, *e.g.*, *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1078-1082 (D.C. Cir. 1996) (explaining Section 209(a) preemption).

Judge Cooper's opinion for the district court below (which the Ninth Circuit adopted in total) took enormous liberties with the state of preemption law as it applies to Section 209(a). The courts below followed a misguided understanding that this Court's case law dealing with express preemption requires the construction of federal enactments to avoid preemption whenever a State has any history of regulatory expertise. Compare Pet. App. 9a ("'Air pollution prevention falls under the broad police powers of the states, which include the power to protect the health of citizens in the state. Environmental regulation has traditionally been a matter of state authority.'") (quoting *Exxon Mobil Corp.* v. *EPA*, 217 F.3d 1246, 1255 (9th Cir. 2000)) with *General Motors*, 406 U.S. at 114-115 ("Congress has largely pre-empted the field with regard to 'emissions from new motor vehicles.'"). This Court has repeatedly made clear that the law of preemption is otherwise. Where Congress has expressly stated its intent to preempt state regulation in a field, Congress's intent will be respected. *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993). Congress's preemptive intent is manifest in the unambiguous language of Section 209(a), and no reason exists to look beyond that plain language. *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992).

As Judge Cooper pointed out, this Court certainly holds, in appropriate cases, that particular state statutes are not preempted by the federal statutes at issue. See, *e.g.*, *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 501-502 (1996); *New York State Conf. of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 668 (1995). Judge Cooper's opinion relied on those cases to conclude that federal preemption under the Clean Air Act should be narrowly interpreted. Pet. App. 9a-10a. But the cited authorities are inapposite in the present context. Only *Travelers* considered language (in Section 514(a) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1144(a)) comparable to Section 209(a), and, unlike the SCAQMD Fleet Rules, the state law that this Court held was not preempted did not "reference" the subject of the preemption clause. 514 U.S. at 656 ("the surcharge statutes cannot be said to make 'reference to' ERISA plans in any manner").

Judge Cooper's citation (Pet. App. 7a-8a) to *California* v. *FERC*, 495 U.S. 490, 497 (1990), for the proposition that courts must "give full effect to evidence that Congress considered, and sought to preserve, the States' coordinate regulatory role in our federal scheme," exemplifies her injudicious choice of preemption authorities. In *California* v. *FERC*, this Court held that state laws *were* preempted, despite language in the Federal Power Act that read: "'Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.'" 495 U.S. at 497 (quoting 16 U.S.C. § 821). In contrast to the courts below, which construed Section 209(a) by resort to first principles concerning supposed presumptions against preemption of the historic police powers of the States, this Court's unanimous opinion in *California* v. *FERC* noted that "the meaning of [16 U.S.C. § 821] and the pre-emptive effect of the FPA are not matters of first impression." 495 U.S. at 497. Here, both prior case law construing Section 209(a) and all evidence of congressional intent – including, most



importantly, the statutory text – shows that Congress carefully considered and decided to preempt the States' role in regulating standards for emissions. When Congress has spoken so clearly, the heavy reliance by the courts below on presumptions against preemption is entirely unwarranted.

*Morales*, in which this Court construed a statute preempting "States from 'enact[ing] or enforc[ing] any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier,'" is particularly instructive because of the near identity of the language of the Airline Deregulation Act (ADA) preemption section, former 49 U.S.C. § 1305(a)(1) (now 49 U.S.C. § 41713(b)(1)), to Section 209(a) of the Clean Air Act. This Court applies the basic rule of statutory construction that courts should read the same (and similar) statutory language in a uniform manner. *Morales*, 504 U.S. at 383-384 (interpreting "relating to" in the ADA uniformly with the interpretation of "relating to" in this Court's ERISA preemption decisions). *Morales* held that the phrase "relating to" in former 49 U.S.C. § 1305(a)(1) was intended to preempt any state law with "'a connection with, or reference to'" the subject of the preemption clause. *Id.* at 384 (quoting *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)).

Faced with an argument that, because the State did not "actually prescrib[e] rates, routes, or services," the State regulations were not preempted, this Court in *Morales* held that such an argument "reads the words 'relating to' out of the statute." *Id.* at 385. Yet SCAQMD prevailed on Judge Cooper and the Ninth Circuit to accept a nearly identical argument – that the Fleet Rules did not actually "compel the manufacturer [of a vehicle or engine] to reduce the actual *amount* of pollutants emitted." SCAQMD C.A. Br. 20 (emphasis in original).[2] Like the petitioner in *Morales*, SCAQMD tries to

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[2] The Ninth Circuit has been grudging in its interpretation of *Morales* even when interpreting the Airline Deregulation Act itself. As three

draw fine distinctions that give each noun in the statutory text the narrowest possible reading – ignoring the operative words "relating to" in Section 209(a).

The SCAQMD Fleet Rules are standards "relating to the control of emissions" even under the narrowest possible view of the *Morales* and *Shaw* precedents.[3] As this Court reiterated in *Travelers*, a state law "relates to" a subject of federal preemption if it has "a connection with or reference to" the area of preemption. 514 U.S. at 656. *Travelers* continued on to analyze the phrase "make 'reference to,'" holding that, because the challenged surcharges were imposed by state law regardless of the existence of an ERISA plan, the state law imposing the surcharges did not make reference to an ERISA plan. *Ibid.* By contrast, the SCAQMD Fleet Rules quite literally "make reference to" the control of emissions. The Fleet Rules impose "Fleet Purchase Requirements" based, in some cases solely and in some cases in part, on whether the relevant vehicles or

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Justices of this Court have observed, the Ninth Circuit's en banc decision in *Charas* v. *Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998) (en banc), narrowly construes the preemption section of that statute in conflict with the decisions of at least three other circuits. See *Northwest Airlines, Inc.* v. *Duncan*, 531 U.S. 1058 (2000) (O'Connor, J., joined by Rehnquist, C.J. & Thomas, J., dissenting from denial of certiorari). Judge Cooper relied on *Charas* to support her statement that "the Supreme Court has cautioned that preemption provisions must be narrowly and strictly construed." Pet. App. 8a.

[3] Indeed, Judge Cooper began her opinion by emphasizing how serious an air pollution problem the South Coast Air Basin has, and how important a contribution emissions make to that problem. Pet. App. 5a-6a; see *id.* at 5a ("Emission of particulate matters from diesel vehicles and equipment is the most significant individual toxic air pollutant in the Basin, accounting for fully seventy-one percent (71%) of the air-borne cancer risk."). Her obvious purpose was to praise respondents for doing something about the emissions problem through the Fleet Rules. Yet her legal analysis turns on the proposition that the Fleet Rules do not even "relat[e] to the control of emissions" within the meaning of the statute. Congress is entitled to have its words given more respect.



engines meet "emissions standards" imposed by the CARB. *Morales* and *Shaw* expose the error of the entire interpretive approach of the courts below in this case.

Congress's intent when enacting the Clean Air Act to preempt regulations like the SCAQMD Fleet Rules is clear from the text of Section 209(a) alone, but the structure and legislative history of Section 209 confirm the interpretation. Section 209(d) contains a savings clause: "Nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles." Courts have interpreted that clause to prevent preemption of "in-use regulations," such as HOV lanes, restrictions on car use in urban areas, and programs to limit excessive idling. See *Engine Mfrs. Ass'n* v. *Huston*, 190 F. Supp. 2d 922, 929 n.5 (W.D. Tex. 2001), vacated as moot, No. 01-50819 (5th Cir. Mar. 5, 2002); cf. *Engine Mfrs. Ass'n*, 88 F.3d at 1093 . This Court has held that the inclusion of a savings clause, like Section 209(d), demonstrates the breadth of the intended preemption. *Shaw*, 463 U.S. at 98. In *Shaw*, the express preemption clause in ERISA Section 514(a) was informed by the savings clause of Section 514(b): "It would have been unnecessary to exempt generally applicable state criminal statutes from pre-emption * * * if Section 514(a) applied only to state laws dealing specifically with ERISA plans." *Ibid.*; see also *Morales*, 504 U.S. at 385-386 ("Moreover, if the pre-emption effected by § 1305(a)(1) were such a limited one, no purpose would be served by the very next subsection, which preserves to the States certain proprietary rights over airports."). Under the inappropriately narrow reading given by Judge Cooper and the Ninth Circuit to Clean Air Act Section 209(a), the Section 209(d) savings clause has no meaning.

Section 209(b) provides an exception to federal preemption for standards set by the State of California, so long as California receives a waiver from the EPA. California, through CARB,

has set such alternate standards, and the EPA has granted a waiver. SCAQMD completely bypassed this waiver procedure in promulgating its Fleet Rules. Congress's provision, in Section 209(b) of the Clean Air Act, of a process for California to follow to accomplish the very goals SCAQMD claims to be pursuing bolsters the reading of Section 209(a) as preempting SCAQMD's Fleet Rules.

The text and structure of Section 209 leave no room for doubt as to the broad preemptive effect of Section 209(a), so resort to the legislative history is unnecessary. But the legislative history of the amendments to the Clean Air Act that inserted the preemption provision of Section 209 likewise completely undermines the conclusions of the courts below. "While the committee is cognizant of the basic right and responsibilities of the States for control of *air pollution*, it is apparent that the establishment of Federal standards applicable *to motor vehicle emissions* is preferable to regulation by individual States." H.R. Rep. No. 728, 90th Cong., 1st Sess., *reprinted in* 1967 U.S.C.C.A.N. 1938, 1955 (emphasis added). Cf. Pet. App. 8a-9a (relying heavily on *general* authority of States to address "air pollution" in case *specifically* involving regulation of emissions by a political subdivision). The Report continues: "The committee feels that a provision such as this is necessary in order to prevent a chaotic situation from developing in interstate commerce in new motor vehicles." 1967 U.S.C.C.A.N. at 1956. The legislative history confirms what a plain-language reading of Section 209 already makes clear – that preemption was decided on as the means to ensure uniformity of standards for the control of emissions.

## II. THE NINTH CIRCUIT'S DECISION INTRODUCES CONFUSION INTO A FEDERAL REGULATORY SCHEME THAT HAS HERETOFORE BEEN CLEARLY UNDERSTOOD BY EVERY COURT TO INTERPRET THE CLEAN AIR ACT

The breadth of the preemption under Section 209(a) has never been the subject of confusion in the federal courts.



The Clean Air Act preemption scheme has been subject to regular explication by federal courts, and all courts correctly understand that "regulation of motor vehicle emissions [is] a principally federal project." *Engine Mfrs. Ass'n*, 88 F.3d at 1079. Congress was concerned that "'an anarchic patchwork of federal and state regulatory programs, a prospect which threatened to create nightmares for the manufacturers,'" might develop. *Ibid.* (quoting *Motor & Equip. Mfrs. Ass'n* v. *EPA*, 627 F.2d 1095, 1109 (D.C. Cir. 1979), cert. denied, 446 U.S. 952 (1980).

The petition for a writ of certiorari demonstrates that the Ninth Circuit's decision in this case conflicts with *American Automobile Manufacturers Association* v. *Cahill*, 152 F.3d 196 (2d Cir. 1998), and *Association of International Automobile Manufacturers, Inc.* v. *Commissioner, Massachusetts Department of Environmental Protection*, 208 F.3d 1 (1st Cir. 2000), and *amici curiae* will not fully replicate that discussion here. *Cahill* and *Commissioner* are prime examples of the correct application of the Section 209(a) preemption language. Both courts invalidated state requirements that a percentage of vehicles sold be ZEVs. *Cahill*, 152 F.3d at 200; *Commissioner*, 208 F.3d at 7. Both the First and the Second Circuits understood the phrase "standards relating to the control of emissions" to "describ[e] regulatory measures intended to lower the level of auto emissions." The ZEV sales requirements, having "no purpose other than to effect a general reduction in emissions," were preempted standards. *Cahill*, 152 F.3d at 200; see *Commissioner*, 208 F.3d at 6. As the petition discusses in greater detail, the First and Second Circuits have interpreted Section 209(a) preemption in a way that is diametrically opposed to the interpretation Judge Cooper and the Ninth Circuit reached below. The SCAQMD Fleet Rules, requirements that fleet operators purchase only certain vehicles – identified by their CARB certification as causing lesser emissions than other technology – have "no purpose other than to effect a general reduction in emissions." Nevertheless, Judge Cooper and the Ninth Circuit held that the Fleet Rules were not

"standard[s] relating to the control of emissions," and thus not preempted by Section 209(a). That result cannot be reconciled with *Cahill* and *Commissioner*.

Courts approaching Section 209(a) from a variety of other angles have also properly understood the breadth of the section's preemptive scope. In *Sims* v. *State of Florida, Department of Highway Safety & Motor Vehicles*, 862 F.2d 1449, 1454-1455 (11th Cir. 1989) (en banc), the Eleventh Circuit considered a state requirement that owners of "gray-market" automobiles – cars not intended to be imported into the United States, and thus not necessarily in compliance with U.S. safety and emissions standards – demonstrate certification by the EPA before being given a title or registration and before selling the vehicles. The court held that the state law was an "'attempt to enforce any standard relating to the control of emissions from new motor vehicles' prior to the initial sale," and was therefore preempted by Section 209(a). *Id.* at 1455 (quoting Section 209(a)) (emphasis and alteration deleted). Like the SCAQMD rules in this case, the Florida regulation was directed at the purchaser, not at the manufacturer or seller. *Ibid.* Accord *Direct Automobile Imports Ass'n* v. *Townsley*, 804 F.2d 1408, 1410-1412 (5th Cir. 1986); *Georgia Automobile Importers Compliance Ass'n* v. *Bowers*, 639 F. Supp. 352, 355-356, 357 (N.D. Ga. 1986).

The parallel preemption scheme contained in Section 209(e), which places limits on state regulation of nonroad vehicles such as construction equipment, likewise has received a consistently broad interpretation.[4] Under Section 209(e)(1), "No State or political subdivision thereof shall adopt or attempt

[4] *Amicus* ARTBA is especially concerned that the Ninth Circuit's decision below opens the door to similar regulation of emissions standards for nonroad motor vehicles that was previously understood to be preempted by Section 209(e).



to enforce any standard or other requirement[5] relating to the control of emissions" from construction or farm equipment. 42 U.S.C. § 7543(e)(1). Like Section 209(b), Section 209(e)(2)(A) exempts California from preemption if granted an EPA waiver, and, like Section 177, 42 U.S.C. § 7507 (discussed at Pet. App. 12a-13a), Section 209(e)(2)(B) permits other States to decide whether to adopt the federal standards or the California standards. 42 U.S.C. § 7543(e)(2)(A)-(B); see *Engine Mfrs. Ass'n*, 88 F.3d at 1080-1081 (discussing the nonroad vehicle preemption issue). The similarity in language between Section 209(a) and Section 209(e)(1) requires that the sections be interpreted consistently. See *Sullivan* v. *Stroop*, 496 U.S. 478, 484 (1990) (citing the "normal rule of statutory construction" that "identical words used in different parts of the same act are intended to have the same meaning").

In *Huston*, the court held that Section 209(e)(1) preempted a Texas Natural Resources Conservation Commission (TNRCC) "fleet composition rule" that was identical in all pertinent respects to the SCAQMD Fleet Rules. TNRCC required individuals operating construction machinery in the Dallas-Fort Worth area "to have fleets with certain percentages of machines of the most modern low-emission design as prescribed by the federal standard." 190 F. Supp. 2d at 928. Like SCAQMD in the courts below, TNRCC defended its fleet composition rule by arguing that "the regulation place[d] no technology-forcing sales restriction or sales quotas on nonroad equipment manufacturers." *Ibid.* Plaintiffs argued that the rule imposed emission standards and was therefore preempted by Section 209(e)(1). *Ibid.* The U.S. District Court for the

[5] An important substantive distinction in subsection (e)(1) is the inclusion of the phrase "or other requirement." The additional language has been interpreted to provide broader preemption than in Section 209(a), preempting not only the adoption and enforcement of standards relating to the control of emissions but also "in-use" requirements that are excepted from Section 209(a) preemption by Section 209(d). See *Huston*, 190 F. Supp. 2d at 927.

Western District of Texas agreed, relying on the EPA's express preemption of "fleet average standards" in 40 C.F.R. § 85.1603(c)(2), as well as the Second Circuit *Cahill* decision and the First Circuit *Commissioner* decision discussed above. TNRCC's fleet composition rule was therefore preempted by Section 209(e)(1).

Until the Ninth Circuit's wholesale acceptance of Judge Cooper's opinion in this case, courts had no difficulty understanding the breadth of preemption under Section 209(a) (and its parallel, Section 209(e)(1)). As the D.C. Circuit noted in *Engine Mfrs. Ass'n*, 88 F.3d at 1086, "the preemption scheme for motor vehicles has been working for almost thirty years." For the first time since the enactment of Section 209(a), a federal appellate court has subjected the preemption of state regulation under Section 209 to uncertainty. This Court should not tolerate such disharmony among the circuits.

## III. THE RAMIFICATIONS TO THE CLEAN AIR ACT REGULATORY SCHEME OF ALLOWING THE UNCERTAINTY CREATED BY THE NINTH CIRCUIT'S DECISION TO REMAIN NECESSITATE A GRANT OF CERTIORARI

The importance of federal preemption to industries reliant on interstate commerce in motor vehicles has been discussed at length by Congress, the EPA, and the courts, and is not subject to genuine debate. It was precisely the "uncertainties involved in litigation" that Congress intended to avoid when preempting all state standards relating to the control of emissions from motor vehicles. 1967 U.S.C.C.A.N. at 1956. Judge Cooper's and the Ninth Circuit's holdings eviscerate Congress's goal, imposing the uncertainty of future regulation and inevitable litigation on a multitude of industries, including those represented by *amici*.

Courts have termed Section 209(a) preemption of state standards the "cornerstone" of the Clean Air Act scheme to regulate automobile emissions. *Engine Mfrs. Ass'n*, 88 F.3d at



1079 (citing *Motor Vehicle Mfrs. Ass'n* v. *New York State Dep't of Env'tl Conservation*, 17 F.3d 521, 526 (2d Cir. 1994)). Without preemption, "'the spectre of an anarchic patchwork of federal and state regulatory programs * * * threatened to create nightmares for the manufacturers.'" *Ibid.* (quoting *Motor & Equip. Mfrs. Ass'n*, 627 F.2d at 1109). See also *Allway Taxi, Inc.* v. *New York*, 340 F. Supp. 1120, 1124 (S.D.N.Y.) (interpreting the legislative history and text of Section 209(a) to conclude that the purpose was "to prevent the burden on interstate commerce which would result if, instead of uniform standards, every state and locality were left free to impose different standards for exhaust emission control devices for the manufacture and sale of new cars"), aff'd, 468 F.2d 624 (2d Cir. 1972).

The EPA also has stressed the importance of the congressional intent to avoid a multitude of state standards. In an "advisory opinion" letter sent to the U.S. Court of Appeals for the First Circuit, in response to that court's self-described "somewhat inartful" application of the primary jurisdiction doctrine, the EPA noted the possibility of frustrating Congress's intent under the Clean Air Act through a narrow definition of the word "standards" in Section 209, which could result in state-by-state regulation of the number (or percentage) of ZEVs – or some other incarnation of motor vehicle that produces lesser emissions – that automakers must supply to the market.[6] *Commissioner*, 208 F.3d at 7. The EPA's advisory opinion adds to the unanimous understanding – apart from the

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[6] Judge Cooper drew a distinction between the ZEV sales requirements held preempted by the First Circuit in *Commissioner*, and the "purchase" requirements imposed by the SCAQMD Fleet Rules. As discussed more fully in the petition, the distinction is not legally cognizable. The EPA's expressed concern (discussed in *Commissioner*) for multifarious standards regarding sale of ZEVs applies equally where the state regulation imposes purchase requirements, which can differ from jurisdiction to jurisdiction and by logical necessity create "sale" requirements.

courts below – that Congress's intent regarding Section 209(a) preemption is uniformity of emissions standards.

The immediate negative effect of permitting the lower courts' rulings to stand would be significant, but the spread of similar regulations in the future as a result of these holdings may be of even greater concern. Left undisturbed, the Ninth Circuit's interpretation of Section 209(a) permits any State or locality within the Circuit's vast geographic boundaries to address its own pollution problem individually through restrictions aimed at purchasers of motor vehicles. States and localities outside the Ninth Circuit – previously kept in check by unanimous authority that prevented the enactment of regulations like the SCAQMD Fleet Rules – are encouraged to roll the dice by promulgating illegal regulations, in the hope of selling the spurious distinction between a purchase restriction based on emissions and "standards relating to the control of emissions" to their respective federal courts.

The legislative history of Section 209 contains recitals of the challenges facing automakers and the economic concerns associated with the need to comply with a multitude of regulatory schemes. When considering the text of what became Section 209(b), the limited waiver of preemption for California, Congress was concerned with two (federal and California) separate standards for control of emissions. "The manufacture of automobiles is a complex matter, requiring decisions to be made far in advance of their actual execution. The ability of those engaged in the manufacture of automobiles to obtain clear and consistent answers concerning emission controls and standards is of considerable importance so as to permit economies in production." 1967 U.S.C.C.A.N. at 1957. Because Congress expressly preempted any "third" standard for control of emissions, through the interplay of Sections 209(a), 177, and 209(b), the legislative history understandably does not consider the greater costs associated with a need to produce automobiles in light of three, four, or a patchwork of standards. Members of *amici* include engine manufacturers that may now



be forced to sell equipment that complies with SCAQMD's standard, and possibly many more standards should State or local regulations for emissions control proliferate.

It is not just manufacturers that stand to lose if the reasoning adopted by Judge Cooper and the Ninth Circuit is applied to allow the SCAQMD Fleet Rules – a third standard – as well as similar purchase restrictions by any other locality within the Ninth Circuit. Considering the potential problem of two emissions standards combined with just two administrative schemes, the House Report noted: "While manufacturers could meet [the problems of differing regulations] by building vehicles that meet whichever standard is the more stringent, this would lead to increased costs to consumers nationwide * * *." 1967 U.S.C.C.A.N. at 1958. The House Report also quoted a Senate Report from the original Clean Air Act: "[I]t would be more desirable to have national standards rather than for each State to have a variation in standards and requirements which could result in chaos insofar as manufacturers, dealers, and users are concerned." *Id.* at 1956 (quoting S. Rep. No. 192, 89th Cong). Such chaos is of particular concern to fleet operators, which, because of the mobile nature of their fleets, regularly exchange vehicles between locations in different jurisdictions. Individual operators could be required to purchase vehicles to comply with a multitude of different emissions standards.

*Amici* organizations have as members many such end users who would be subjected to greater costs and economic disadvantages under Judge Cooper's and the Ninth Circuit's rule. If subregion-by-subregion fleet rules are allowed to proliferate, operators that engage in exchanges between their various business locations will be forced to incur extraordinary costs to purchase or lease vehicles that meet the most stringent emissions standards. Small operators are given a strong incentive not to expand to the fifteen-vehicle size that triggers application of the SCAQMD Fleet Rules, and operators with barely more than the fifteen-vehicle trigger must either reduce

their size or be disproportionately affected. Confusion may also erupt when fleet operators located in one jurisdiction conduct business in another. An operator (of any size fleet) that leases vehicles to customers within SCAQMD will be required to stock vehicles that comply with the emissions standards set out in the Fleet Rules, so its customers will have access to compliant vehicles. The immediate damage of the Ninth Circuit's holding, and uncertainty and future costs, can be avoided if this Court grants the petition and reverses the Ninth Circuit's departure from the long-settled understanding of Section 209(a).

## CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2003

(7)

No. 02-1343

FILED
AUG 29 2003
OFFICE OF THE CLERK

In The
# Supreme Court of the United States

ENGINE MANUFACTURERS ASSOCIATION AND WESTERN STATES PETROLEUM ASSOCIATION,

*Petitioners,*

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, ET AL.,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## JOINT APPENDIX

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**Certiorari Granted on June 9, 2003**

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Opinion of the United States Court of Appeals for the Ninth Circuit denying petition for rehearing and rehearing *en banc*, dated December 11, 2002 ..... Pet. App. 28a



RELEVANT DOCKET ENTRIES

Ninth Circuit

01-56688

| | |
|---|---|
| 9/28/01 | DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): Y. setting schedule as follows: CADS is past due; CADS must be filed no later than 10/5/01; appellant's opening brief is due 11/7/01; appellees' brief is due 12/7/01,, ; appellants' reply brief is due 12/21/01; [01-56688] (pg) [01-56688] |
| 12/26/01 | Filed motion of Appellant and deputy clerk order: (Deputy Clerk: cb) granting motion & order to extend time to file appellant's opening brief. Aplt's br may be enlarged pursuant to 9th CR 28-4. [4326544-1] appellants' opening brief due 1/28/02; appellees' brief due 3/20/02. Aples' joint br size may also be enlarged . . . the opt reply br is due 14 days from service . . . (Motion recvd 12/19/01) [01-56685, 01-56688] (gar) [01-56685 01-56688] |
| 1/29/02 | Filed original and 15 copies Appellant Engine Manufacturers and Western States Petro's opening brief (Informal: n) 44 pages and five excerpts of record in 1volumes; served on 1/28/02 [01-56685, 01-56688] (gar) [01-56685 01-56688] |
| 2/1/02 | Filed original and 15 copies Amer Auto Leasing and Natl Assoc of Fleet Admin's joint amicus brief of 31 pages; served on 1/31/02. BRIEF FILED WITH CONSENT OF ALL PARTIES [01-56685, 01-56688] (gar) [01-56685 01-56688] |
| 2/4/02 | Received Amicus Alliance Auto Man brief in 15 copies of 29 pages in support of aplts; deficient; motion pending w/PROMO; served on 2/2/02 |

RECORDS FOR MERITS PANEL per order of 2/12/02 [01-56685, 01-56688] (gar) [01-56685 01-56688]

2/5/02 Received Amicus American Road & Tra brief in 15 copies of 28 pages; deficient: mtn pending w/PROMO;served on 2/4/02 RECORDS FOR MERITS PANEL per order of 2/12/02 [01-56685, 01-56688] (gar) [01-56685 01-56688]

4/22/02 Received orig. 15 copies Natural Resources' brief of 61 pages; served on 4/19/02 deficient; excerpts oversized, no Statmnt Rel cases. Notified counsel. [01-56685, 01-56688] (gar) [01-56685 01-56688]

4/22/02 Filed original and 15 copies Appellee South Coast Air Qual, William A. Burke, Norma J. Glover, Michael D. Antonovich, Hal Bernson, Jane W. Carney's brief, 72 pages, 5 suppl exc in 1 vol; served on 4/19/02 minor defcy: no original included Notified counsel. [01-56685, 01-56688] record on appeal due 5/9/02 in 01-56685, in 01-56685; (gar) [01-56685 01-56688]

4/25/02 Received orig and 15 copies Amicus Curiae Sunline Transit Agency and ENRG, Inc.'s brf of 23 pages in supp of Aples; served on 4/24/02 (**RECORDS/MERITS PANEL per 2/12/02 order**) [01-56685, 01-56688] (gail) [01-56685 01-56688]

4/26/02 Filed notice of joint reply brief by Appellant Engine Manufacturers and Western States Petro in Briefing schedule is now as follows: reply brief has an extra 21 days added to due date. Five additional pages are authorized for reply brief only. (CASEFILE) [01-56685, 01-56688] (gar) [01-56685 01-56688]

4/29/02 Received Amicus Nat Gas Vehicle amicus brief in 15 copies of 20 pages; deficient: RECORDS



FOR MERITS PANEL PER 2/12/02 ORDER, served 4/26/02 01-56685, 01-56688] (gar) [01-56685 01-56688]

4/29/02 Filed original and 15 copies States of CA and NY amicus brief of 34 pages ;served on 4/26/02 [01-56685, 01-56688] (gar) [01-56685 01-56688]

4/30/02 Filed original and 15 copies appellee Natural Resources' 61 pages brief, 5 suppl Exc.in 2 vols: ; served on 4/19/02 [01-56685, 01-56688] (gar) [01-56685 01-56688]

6/24/02 Filed original and 15 copies Engine Manufacturers and Western States Petro reply brief, (Informal: n) 33 pages; served on 6/21/02 [01-56685, 01-56688] (gar) [01-56685 01-56688]

10/11/02 ARGUED AND SUBMITTED TO Alfred T. GOODWIN, Pamela A. RYMER, M. M. McKEOWN [01-56685, 01-56688] (bg) [01-56685 01-56688]

10/24/02 Order filed AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Unsigned, Published. Alfred T. GOODWIN, Pamela A. RYMER, M. M. McKEOWN) [01-56685, 01-56688] (gar) [01-56685 01-56688]

11/13/02 [4579293] Filed original and 50 copies Appellant Engine Manufacturers Western States Petro in petition for panel rehearing and petition for rehearing en banc 8 p.pages, served on 11/12/02 PANEL AND ALL ACTIVE JUDGES [01-56685, 01-56688] (gar) [01-56685 01-56688]

12/11/02 Filed order (Alfred T. GOODWIN, Pamela A. RYMER, M. M. McKEOWN,): denying petition for rehearing and enbanc rehearing [4579293-1] [01-56685, 01-56688] (gar) [01-56685 01-56688]

12/19/02 MANDATE ISSUED [01-56685, 01-56688] (gar) [01-56685 01-56688]

3/21/03 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 02-1343 filed on 3/11/03. (CASEFILE) [01-56688, 01-56685] (ru) [01-56685 01-56688]

6/13/03 Received notice from Supreme Court, petition for certiorari GRANTED on 6/9/03. Supreme Court No. 02-1343 (CASEFILE) (ru) [01-56685 01-56688]

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**U.S. District Court**

**00-CV-9065**

8/24/00 1 COMPLAINT filed referred to Discovery Brian Q. Robbins (pc) [Entry date 08/28/00] [Edit date 08/30/00]

10/23/00 8 ANSWER filed by defendants South Coast Air, Norma Glover, Michael D Antonovich, Hal Bernson, Jane W Carney, Cynthia P Coad, Beatrice J S Lapistokirtley, Ronald O Loveridge, Jon D Mikels, Leonard Paulitz, Cynthia Verdugo-Peralta, S Roy Wilson, Barry R Wallerstein to complaint [1-1] (jp) [Entry date 10/25/00]

11/21/00 11 FIRST AMENDED COMPLAINT [1-1] for declaratory & injunctive relief by plaintiff Engine Manufacturers. Summons not issued (rrey) [Entry date 11/22/00]

12/18/00 12 STIPULATION and ORDER by Judge Florence-Marie Cooper allowing intervention by intervenors Natural Resources, Coalition for Clean, Comm For A Bet Env, Plan & Consv League, Sierra Club (rrey) [Entry date 12/21/00]

12/21/00 13 ANSWER filed by defendants South Coast Air Quality Management District, & District defendants William A Burke, Norma J Glover, Michael D Antonovich, Hal Bernson, Jane W Carney, Cynthia P Coad, Beatrice J S Lapistokirtley, Ronald O Loveridge, Jon D Mikels, Leonard Paulitz, Cynthia Verdugo-Peralta, S Roy Wilson, Barry R Wallerstein to 1st amended complaint [11-1] (rrey) [Entry date 12/26/00]

12/21/00 15 ANSWER filed by intervenor defendant Coalition for Clean, intervenor defendant

Natural Resources, intervenor defendant Comm for Better, intervenor defendant Planning & Conservat, intervenor defendant Sierra Club to 1st amended complaint [11-1] (jag) [Entry date 12/27/00]

1/17/01 19 STIPULATION and ORDER by Judge Florence-Marie Cooper for leave to interven [sic] by Western States Association (see doc for fur details) (rrey) [Entry date 01/18/01]

1/17/01 20 INTERVENOR'S COMPLAINT by intervenor plaintiff Western States Petroleum Association (rrey) [Entry date 01/18/01] [Edit date 01/18/01]

2/13/01 23 ANSWER filed by intervenor defendants Natural Resources Defense Council Inc, Coalition For Clean Air Inc, Communities for a Better Environment, Planning & Conservation League, Sierra Club to complaint-in-intervention [20-1] (rrey) [Entry date 02/14/01]

2/13/01 24 ANSWER filed by defendants South Coast Air, William A Burke, Norma J Glover, Michael D Antonovich, Hal Bernson, Jane W Carney, Cynthia P Coad, Beatrice J S Lapistokirtley, Ronald O Loveridge, Jon D Mikels, Leonard Paulitz, Cynthia Verdugo-Peralta, S Roy Wilson, Barry R Wallerstein to complaint-in-intervention [20-1] (rrey) [Entry date 02/15/01]

3/23/01 28 NOTICE OF MOTION AND MOTION by defendants for summary judgment purs to FRCP 56(b); motion hearing set for 10:00 5/21/01; Lodged Stmt of UFCL & propsd Jgmt (jp) [Entry date 03/26/01]

3/23/01 29 MEMORANDUM OF POINTS & AUTH by defendants in supt of motion for summary judgment [28-1] (jp) [Entry date 03/26/01]



3/23/01 30 APPENDIX OF EXHIBITS by defendants to motion for summary judgment [28-1] (jp) [Entry date 03/26/01]

3/23/01 31 DECLARATION of LARRY IRWIN by defendants in suppt of motion for summary judgment [28-1] (jp) [Entry date 03/26/01]

3/23/01 32 NOTICE OF MOTION AND MOTION by plaintiff Engine Manufacturers Assoc for summary judgment on count one (1) thru six (6) of Ema's 1st A/C for declatory & injunctive relief; motion hearing set for 10:00 5/21/01; Lodged Propsd Ord & Stmt of U/F (jp) [Entry date 03/26/01]

3/23/01 33 MEMORANDUM OF POINTS & AUTHORITIES by plaintiff Engine Manufacturers in suppt of motion for summary judgment on count one (1) through six (6) of Ema's 1st A/C for declatory & injunctive relief [32-1] (jp) [Entry date 03/26/01]

3/23/01 34 DECLARATION of JED R. MANDEL by plaintiff Engine Manufacturers in suppt of motion for summary judgment on count one (1) thru six (6) of Ema's 1st A/C for declatory & injunctive relief [32-1] (jp) [Entry date 03/26/01]

3/23/01 35 DECLARATION of JOHN W. DUERR by plaintiff Engine Manufacturers in suppt of motion for summary judgment on count one (1) thru six (6) of Ema's 1st A/C for declatory & injunctive relief [32-1] (jp) [Entry date 03/26/01]

3/23/01 36 DECLARATION of STEVEN R. BUTLER by plaintiff Engine Manufacturers in suppt of motion for summary judgment on count one (1) thru six (6) of Ema's 1st A/C for declatory

& injunctive relief [32-1] (jp) [Entry date 03/26/01]

3/23/01 37 DECLARATION of EUGENE M. SWEENEY by plaintiff Engine Manufacturers in suppt of motion for summary judgment on count one (1) thru six (6) of Ema's 1st A/C for declatory & injunctive relief [32-1] (jp) [Entry date 03/26/01]

3/23/01 38 DECLARATION of JEFFREY A. MARSEE by plaintiff Engine Manufacturers in suppt of motion for summary judgment on count one (1) thru six (6) of Ema's 1st A/C for declatory & injunctive relief [32-1] (jp) [Entry date 03/26/01]

3/23/01 39 JOINDER by intervenor defendants in defendant South Coast Notice of motion and motion for summary judgment [28-1], stmt of uncontroverted facts & conclusions of law in suppt of mot for S/J, etc. (jp) [Entry date 03/27/01]

3/23/01 40 APPENDIX OF EXHIBITS by intervenor defendants to memorandum of points & auth of in suppt of motion for summary judgment [28-1] (jp) [Entry date 03/27/01]

3/23/01 41 MEMORANDUM OF POINTS & AUTH by intervenor defendants in suppt of motion for summary judgment [28-1] (jp) [Entry date 03/27/01]

3/23/01 42 NOTICE OF MOTION AND MOTION by intervenor plaintiff Western States for summary judgment as to all dfts named in the cmp in intervention; Decls of Douglas Henderson, Brian E. Wall; motion hearing set for 10:00 5/21/01; Lodged propsd stmt & propsd jgm (jp) [Entry date 03/27/01]



4/5/01 44 Appendix of exhibit 1 (revised) by intervenor to memo of points and authorities of environmental defendants' in support of motion for summary judgment [28-1] (bp) [Entry date 04/06/01]

4/20/01 46 Memorandum by plaintiff Engine Manufacturers in response and in opposition to motion for summary judgment [28-1] (bp) [Entry date 04/23/01]

4/20/01 47 Memorandum by plaintiff Engine Manufacturers in reponse [sic] to the memorandum submitted in support of the motion for summary judgment [28-1] (bp) [Entry date 04/23/01]

4/20/01 48 MEMORANDUM of points and authorities filed by intervenor plaintiff Western States Pet in opposition to motion for summary judgment [28-1] (bp) [Entry date 04/23/01]

4/20/01 49 Objections to the evidence by intervenor plaintiff Western States Pet in the motion for summary judgment [28-1] (bp) [Entry date 04/23/01]

4/20/01 50 Statement of genuine issues by intervenor plaintiff Western States Pet in response to motion for summary judgment [28-1] (bp) [Entry date 04/23/01]

4/20/01 51 DECLARATION of Leslie Krinsk by defendant South Coast Air in support of motion for summary judgment [28-1] (bp) [Entry date 04/23/01]

4/20/01 52 DECLARATION of David R. Coel by defendant South Coast Air in support of motion for summary judgment [28-1] (bp) [Entry date 04/23/01]

4/20/01 53 Statement of genuine issues by defendant South Coast air in opposition to Plf-in-intervention Western States statement of UFCL motion for summary judgment as to all dfts named in the cmp in intervention [42-1] (bp) [Entry date 04/23/01]

4/20/01 54 Statement of genuine issues by defendant South Coast Air in opposition to plf Engine Manufacurer's [sic] statement of UFCL motion for summary judgment on count one (1) through six (6) of Ema's 1st A/C for declatory & injunctive relief [32-1] (bp) [Entry date 04/23/01]

4/20/01 55 MEMORANDUM of points and authorities filed by defendant South Coast Air in opposition to motion for summary judgment as to all dfts named in the cmp in intervention [42-1] (bp) [Entry date 04/23/01]

4/20/01 56 MEMORANDUM of points and authorities filed by defendant South Coast Air in opposition to motion for summary judgment on count one (1) thru six of Ema's 1st A/C for declatory & injunctive relief [32-1] (bp) [Entry date 04/23/01]

4/20/01 57 OPPOSITION by intervenor defendant Natural Resources to motion for summary judgment as to all dfts named in the cmp in intervention [42-1] (bp) [Entry date 04/24/01]

4/20/01 58 OPPOSITION by intervenor Natural Resources to motion for summary judgment on count one (1) thru six (6) of Ema's 1st A/C for declatory & injunctive relief [32-1] (bp) [Entry date 04/24/01]

4/20/01 59 Amicus Curiae Brief by State of CA in opposition to motion for summary judgment



as to all dfts named in the cmp in intervention [42-1] (bp) [Entry date 04/24/01]

4/20/01 60 Statement of UFCL by intervenor Coalition for Clean in opposition to motion for summary judgment on count one (1) thru six (6) Ema's 1st A/C for declatory & injunctive relief [32-1] (bp) [Entry date 04/26/01]

5/11/01 61 REPLY Memorandum by plaintiff Engine Manufacturers in support of motion for summary judgment on count one (1) thru six (6) Ema's 1st A/C for declatory & injunctive relief [32-1] (bp) [Entry date 05/14/01]

5/11/01 62 RESPONSE to opposition memorandum of plaintiff by defendant South Coast Air (bp) [Entry date 05/14/01]

5/11/01 64 REPLY to the opposition briefs of plaintiff Engine Manufactureres [sic] and the opposition brief of plaintiff-in-intervention Western States Petroleum Association by intervenor Natural Resources (bp) [Entry date 05/16/01]

5/11/01 65 RESPONSE to plaintiff-in-intervention Western State Petroleum's ojbections [sic] to evidence by intervenor Natural Resources (bp) [Entry date 05/16/01]

5/11/01 67 REPLY memorandum of points and authorities by intervenor plaintiff Western States Pet in support of motion for summary judgment as to all dfts in the cmp in intervention [42-1] (bp) [Entry date 05/16/01]

5/14/01 66 NOTICE of lodging of administrative record by defendant South Coast Air (bp) [Entry date 05/16/01]

6/25/01 71 MINUTES: Plaintiff's motion for summary judgment on counts 1-6 on first amended

complaint; defendant SCA1MD's motion for summary judgment; Intervenor plaintiff Western States' motion for summary judgment. The court hears oral argument in the above-referenced motions. The court indicates it will abide by its tentative ruling. The court's final order will issue by Judge Florence-Marie Cooper CR: N/A (bp) [Entry date 06/26/01]

7/3/01 72 RECEIPT OF TRANSCRIPT of proceedings for the following date(s): 6/25/01 CR: Pat Cuneo (dl) [Entry date 07/09/01]

7/3/01 -- TRANSCRIPT filed for proceedings held on 6/25/01 (dl) [Entry date 07/09/01]

7/25/01 75 STIPULATION and ORDER that count seven as set forth in EMA's first amended complaint filed in this action on 11/21/00 is hereby dismissed with prejudice by Judge Florence-Marie Cooper (sent) (bp) [Entry date 07/26/01]

8/22/01 76 JUDGMENT AND ORDER: by Judge Florence-Marie Cooper. It is hereby Ordered and Adjudged that: Defendant South Coast Air Quality Management District's motion for summary judgment is granted. The Fleet rules adopted by the South Coast Air Quality Managment [sic] District that are at issue in this litigation (rules 1191, 1192, 1193, 1994, 1186.1 and 1196) were lawfully enacted and are lawful and valid in all respects. The motion for summary judgment by defendants-in-intervention is Granted. Plaintiff's motion for summary judgment is Denied. Plaintiff-in-intervention's motion for summary jdugment [sic] is Denied. Plaintiff and Plaintiff-in-intervention shall take nothing by this



action. The action is dismissed on the merits. Defendants and Defendants-in-intervention shall recover their costs (ENT 8/23/01) (bp) [Entry date 08/23/01]

8/22/01 77 ORDER re: cross motion for summary judgment by Judge Florence-Marie Cooper. The court concludes that the Fleet Rules are not preempted by 209(a) of the Clean Air Act and are a valid exercise of the SCAQMD's authority. Section 177 does not apply to the District's Fleet Rules. Plaintiffs' motions for summary judgment as to counts one through six of their complaints are denied. Defendants' motions for summary judgment are granted (ENT 8/23/01) (bp) [Entry date 08/23/01]

9/13/01 78 NOTICE OF APPEAL by plaintiff Engine Manufacturers Association ("EMA") to 9th C/A from Dist. Court Jgm & Ord fld 8/22/01 & ent 8/23/01 [76-1] (cc: Elizabeth L. MacDowell; Jed R. Mandel; Barbara Baird; Daniel P. Selmi; Fran M. Layton; Gail Ruderman Feuer; Teresa A. Beaudet; Susan L. Durbin) Fee: Paid (weap) [Entry date 09/14/01]

9/18/01 80 NOTICE OF APPEAL by intervenor plaintiff Western States Petroleum Association to 9th C/A from Dist. Court ord ent 8/23/01 [77-1], jgm & ord ent 8/23/01 [76-1] (cc: Mayer, Brown & Platt;Neal Geber & Eisenberg; Benshoof, Rochefort, Rubalcava & MacCuish;Barbara Baird & Kurt R. Wiese; Daniel P. Selmi;Shute Mahaly & Weinberger; Gail Ruderman Feuer & Julie Masters;Susan Durbin) Fee: Billed (app) [Entry date 09/18/01]

9/27/01 83 CERTIFICATE of Record Transmitted to USCA (cc: all parties) (dl) [Entry date 09/27/01]

10/29/01 88 ORDER FROM USCA: Crt is in receipt of parties' joint mot to consolidate App #s 01-56685 & 01-56688. Apps ord consol. Stip proposes new time sched ord that extends due dates beyond those established_by C/A under FRAP 31(a). Crt declines to accept parties proposed sched. Brief sched for consol cases is set. All parties on a side are encouraged to join in single brief to greatest extent possible. If good cause is shown, Crt will entertain req for ext of time to file brief under 9th CR 31-2.2. (01-56685; 01-56688) (wdc) [Entry date 11/05/01]

11/1/01 87 CERTIFICATE of Record Transmitted to USCA # 01-56685 (cc: all parties) (dl) [Entry date 11/01/01]

12-26-02 -- LODGED CC 9th CCA JUDGMENT judgment of said District Court affirmed. (01-56685, 01-56688) (FWD TO CRD) (pjap) [Entry date 01/06/03]

12/27/02 96 CERTIFIED COPY of Appellate Court Order: affirming the decision of the District Court [80-1], affirming the decision of the District Court [781] (bp) [Entry date 12/30/02]

12/27/02 97 MANDATE from Circuit Court of Appeals filing and spreading the affirming of the decisions from the said District Court. (bp) [Entry date 12/30/02]

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**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

ENGINE MANUFACTURERS ASSOCIATION,

Plaintiff,

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT ("SCAQMD"), et al.,

Defendants.

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NATURAL RESOURCES DEFENSE COUNCIL, INC., COALITION FOR CLEAN AIR, INC., COMMUNITIES FOR A BETTER ENVIRONMENT, INC., PLANNING AND CONSERVATION LEAGUE, and SIERRA CLUB,

Intervenors.

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WESTERN STATES PETROLEUM ASSOCIATION,

Intervenor.

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Case No. 00-09065 FMC (BQRX)

The following eleven items were entered as exhibits in this court.

South Coast Air Quality Management District

*(Adopted August 18, 2000)*

Rule 1186.1 Less-Polluting Sweepers

**(a) Purpose**

To reduce air toxic and criteria pollutant emissions, this rule requires certain public and private sweeper fleet operators to acquire alternative-fuel or otherwise less-polluting sweepers when purchasing or leasing these vehicles for sweeping operations undertaken by or for governments or governmental agencies in the jurisdiction of the South Coast Air Quality Management District (District).

**(b) Applicability**

(1) This rule applies to any federal, state, county, city or governmental department or agency, any special district such as water, air, sanitation, transit, and school districts, or private individual firm, association, franchise, contractor, user or owner who provides sweeping services to a governmental agency that owns or leases 15 or more vehicles, including passenger cars, light-duty trucks, and medium- and heavy-duty on-road vehicles, but excluding those vehicles exempt as defined by Rule 1191 paragraph (f)(1).

(2) Sweepers having a gross vehicle weight of 14,000 pounds or more are subject to this rule.

**(c) Definitions**

For purposes of this rule, the following definitions shall apply:



(1) AFFECTED GOVERNMENTAL AGENCY means any governmental agency in the District's jurisdiction that owns or leases 15 or more vehicles, including passenger cars, light-duty trucks, and medium- and heavy-duty on-road vehicles, excluding those exempt as defined by Rule 1191 paragraph (f)(1).

(2) ALTERNATIVE-FUEL SWEEPER means a sweeper with engine(s) that use compressed or liquefied natural gas, liquefied petroleum gas (propane), methanol, electricity, or fuel cells. Hybrid-electric and dual-fuel technologies that use diesel fuel are not considered alternative-fuel technologies for the purposes of this rule.

(3) APPROVED CONTROL DEVICE(S) is a California Air Resources Board (CARB)-certified exhaust control device(s) that reduces particulates and possibly other precursor emissions. To be considered fitted with approved control device(s), all diesel exhaust from the sweeper, including the auxiliary engine (if applicable) must be vented through such a device(s) that have been certified by CARB at the time of vehicle purchase.

(4) FLEET OPERATOR is any federal, state, county, city, or governmental department or agency, any special district such as water, air, sanitation, transit, and school districts, or private individual firm, association, franchise, contractor, user or owner who provides sweeping services to a governmental agency that owns or leases 15 or more vehicles, including passenger cars, light-duty trucks, and medium- and heavy-duty on-road vehicles, excluding those exempt as defined by Rule 1191 paragraph (f)(1).

(5) GOVERNMENTAL AGENCY include [sic] any federal, state, regional, county, city, or governmental department and agency, and any special district such as water, air, sanitation, transit, and school districts. See AFFECTED GOVERNMENTAL AGENCY.

(6) LOW-SULFUR DIESEL FUEL means diesel fuel that has a maximum sulfur content of 15 parts per million (ppm). The use of low-sulfur diesel fuel improves the performance of and may be necessary for the use of advanced exhaust control devices.

(7) PURCHASE OR LEASE means that a purchase or lease contract has been signed by both parties for a sweeper to be delivered within 1 year of the purchase or lease contract date, which is the date the contract is signed by both parties.

(8) SWEEPER means any heavy-duty vehicle with a gross vehicle weight of 14,000 pounds or more that is permitted to operate on public roads through California Department of Motor Vehicle registration or the federal government and used for the express purpose of removing material from paved surfaces, by mechanical means through the action of one or more brooms, or by suction through a vacuum or regenerative air system or any combination of the above.

(9) SWEEPING OPERATIONS means operations to remove material from paved surfaces using sweeper(s), as defined by this rule.



**(d) Requirements**

**For Fleet Operators:**

(1) Beginning July 1, 2002, a fleet operator shall meet the following conditions for each individual purchase or lease of a replacement or additional sweeper:

(A) Purchase or lease an alternative-fuel sweeper, OR

(B) Before July 1, 2004, if the fleet operator has an approved Technical Infeasibility Certification for this individual purchase or lease, as described in subdivision (e),

(i) purchase or lease a non-alternative fueled sweeper with all applicable approved control device(s), and

(ii) maintain the approved control device(s) per manufacturer's specifications, and

(iii) if using diesel fuel, fuel the sweeper with low-sulfur diesel fuel only, and

(iv) comply with Rule 1186 without invoking the exemption provision in Rule 1186 paragraph (i)(3), unless a demonstration is made to the Executive Officer that for solely technical reasons no certified sweeper, as defined in Rule 1186 paragraph (c)(2), is commercially available.

**For Affected Governmental Agencies Contracting for Sweeping Services:**

(2) Any affected governmental agency that signs a contract after July 1, 2002 for sweeping services must:

(A) Contract for sweeping services that use alternative-fuel sweeper(s), OR

(B) Solicit bids for sweeping operations using alternative-fuel sweepers and if no bids are submitted:

(i) Contract for non-alternative fueled sweeper(s) and ensure that the sweeper(s) are only fueled with low-sulfur diesel and outfitted with approved control device(s) that are installed and maintained per the manufacturer's specifications, and

(ii) Contract for sweeper(s) that comply with Rule 1186 without invoking the exemption provision in Rule 1186 paragraph (i)(3), unless a demonstration is made to the Executive Officer that for solely technical reasons no certified sweeper, as defined in Rule 1186 paragraph (c)(2), is commercially available.

(3) After January 1, 2003, any renewal or extension option of a contract is considered a new contract that must meet the requirements of paragraph (d)(2).



**(e) Technical Infeasibility Certification Criteria and Procedures**

(1) Six months prior to the date of purchase or lease of a replacement or additional sweeper, any fleet operator seeking to comply with subdivision (d) without purchasing or leasing an alternate-fuel sweeper [i.e., opting to comply with paragraph (d)(2)], shall demonstrate the technical infeasibility of complying with paragraph (d)(1) requirements by submitting a signed and dated Technical Infeasibility Certification Request to the Executive Officer and attest to the accuracy of all statements therein, that shall include:

(A) the name and address of the fleet operator; and

(B) current sweeper fleet composition, including make, model, and a complete description of the sweepers' dust suppression systems; and

(C) demonstration that no alternative-fuel engine and chassis configuration is commercially available from any manufacturer for sweeping operations conducted by the fleet operator (only technical reasons for choosing a given chassis configuration are acceptable), OR

(D) demonstration that a fueling station for alternative-fuel sweepers commercially available from any manufacturer for sweeping operations conducted by the fleet operator is not available within five miles of the vehicle storage or maintenance yards.

(2) Within 90 calendar days of receipt of a completed Technical Infeasibility Certification Request submitted pursuant to paragraph (e)(1), the Executive Officer will either approve or disapprove the Request, in writing.

(3) The Executive Officer shall disapprove a Technical Infeasibility Certification Request if it does not meet the requirements of paragraph (e)(1). If a Technical Infeasibility Certification Request is disapproved by the Executive Officer:

(A) The reasons for disapproval shall be given to the applicant in writing.

(B) Upon receipt of a notice of a disapproved Technical Infeasibility Certification Request, the fleet operator shall comply with paragraph (d)(1).

(C) The fleet operator may resubmit a Technical Infeasibility Certification Request at any time after receiving a disapproval notification, but must still comply with paragraph (d)(1) until such time as the Executive Officer approves a Technical Infeasibility Certification Request under paragraph (e)(1).

(4) A Technical Infeasibility Certification Request is subject to plan filing and evaluation fees as described in Rule 306.

**(f) Exemptions**

(1) The provisions of this rule shall not apply to fleets consisting of evaluation/test vehicles, provided by or operated by the vehicle manufacturer or manufacturer representative for testing or evaluation, exclusively.



(2) The provisions of subdivision (d) shall not apply to a sweeper purchase by a fleet operator that is solely dedicated to serving governmental agencies that are not subject to this rule, upon demonstration to and approval of the Executive Officer.

**(g) Compliance Auditing and Enforcement**

(1) At the request of the Executive Officer, the fleet operator shall provide the purchase, lease, or contract records for their sweepers to demonstrate compliance with subdivision (d).

(2) At the request of the Executive Officer, any fleet operator claiming an exemption under subdivision (f) shall supply proof that their sweeper or fleet is exempted from this rule.

**(h) Severability**

If any provision of this rule is held by judicial order to be invalid, or invalid or inapplicable to any person or circumstance, such order shall not affect the validity of the remainder of this rule, or the validity or applicability of such provision to other persons or circumstances. In the event any of the exceptions to this rule is held by judicial order to invalid, the persons or circumstances covered by the exception shall instead be required to comply with the remainder of this rule.

South Coast Air Quality Management District

*(Adopted June 16, 2000)*

Rule 1191 – Clean On-Road Light- and Medium-Duty Public Fleet Vehicles

**(a) Purpose**

For public fleets operating in the South Coast Air Quality Management (District), this rule requires passenger car, light-duty truck, or medium-duty vehicle fleet operators to acquire low-emitting gasoline or alternative-fuel vehicles to reduce air toxic and criteria pollutants emissions when procuring or leasing these vehicles in the District.

**(b) Applicability**

This rule applies to all government agencies located in the District, including federal, state, regional, county and city government departments and agencies, and any special districts such as water, air, sanitation, transit, and school districts, with 15 or more non-exempt vehicles. This rule shall not apply to vehicles exempt under paragraph (f) including emergency vehicles operated by federal, state, or local law enforcement agencies; fire departments; or to paramedic and rescue vehicles; or heavy-duty on-road vehicles.

**(c) Definitions**

For purposes of this rule, the following definitions shall apply:

(1) ALTERNATIVE-FUELED VEHICLE means a vehicle or engine that is not powered by gasoline or diesel fuel and emits hydrocarbon, carbon monoxide,



or nitrogen oxides, on an individual basis at least equivalent to or lower than a ULEV based on ARB's certification data.

(2) EMERGENCY OR RESCUE VEHICLE means any vehicle defined in Section 165 of the California Vehicle Code and is equipped with red lights and sirens as defined in Sections 30, 25269, and 27002 of the California Vehicle Code.

(3) FLEET VEHICLES means any vehicles including passenger cars, light-duty trucks, and medium-duty on-road vehicles, owned or leased by a public fleet operator that totals 15 or more vehicles excluding vehicles exempt under paragraph (f).

(4) HEAVY-DUTY VEHICLE means any vehicle having a gross vehicle weight of at least 14,000 pounds.

(5) LIGHT-DUTY TRUCK means any motor vehicle rated at 6,000 pounds gross vehicle weight or less which is designed primarily for purposes of transportation of property or is a derivative of such vehicle, or available with special features enabling off-street or off-highway operation and use.

(6) LOW-EMISSION VEHICLE (LEV) means any vehicle certified to low-emission standards set forth in the "California Exhaust Emission Standards and Test Procedures for 1988-2000 Model Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles" and "California Exhaust Emission Standards and Test Procedures for 2001 and Subsequent Model Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles," as incorporated by reference in Sections 1960.1(k) and 1961(d), Title 13, California Code of Regulations.

(7) LOW-EMITTING GASOLINE VEHICLE means a vehicle or engine that emits hydrocarbon, carbon

monoxide, or nitrogen oxides, on an individual basis at least equivalent to or lower than a LEV based on ARB's certification data.

(8) MEDIUM-DUTY VEHICLE means any vehicle having a gross vehicle weight of more than 6,000 pounds and less than 14,000 pounds.

(9) PASSENGER CAR means any vehicle designed primarily for transportation of persons and having a design capacity of twelve (12) persons or less.

(10) PUBLIC FLEET OPERATOR is a person who owns, leases, or operates fleet vehicles in the District. A person is federal, state, county and city government departments and agencies, and special districts.

(11) SPECIAL DISTRICT means any public agency that provides public services such as, but not limited to, sanitation, school, transit, air, and water districts.

(12) SUPER-ULTRA-LOW-EMISSION VEHICLE (SULEV) means any vehicle certified to super-ultra-low-emission standards set forth in the "California Exhaust Emission Standards and Test Procedures for 1988-2000 Model Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles" and "California Exhaust Emission Standards and Test Procedures for 2001 and Subsequent Model Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles," as incorporated by reference in Sections 1960.1(k) and 1961(d), Title 13, California Code of Regulations.

(13) ULTRA-LOW-EMISSION VEHICLE (ULEV) means any vehicle certified to ultra-low-emission standards set forth in the "California Exhaust Emission Standards and Test Procedures for 1988-2000 Model Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles" and "California Exhaust Emission Standards and Test Procedures for 2001 and Subsequent



Model Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles," as incorporated by reference in Sections 1960.1(k) and 1961(d), Title 13, California Code of Regulations.

(14) VEHICLE means any self-propelled, motorized device that is permitted to operate on public roads through Department of Motor Vehicle registration or the federal government.

(15) ZERO-EMISSION VEHICLE (ZEV) means any vehicle certified to the zero-emission standards set forth in the "California Exhaust Emission Standards and Test Procedures for 2003 and Subsequent Model Zero-Emission Vehicles, and 2001 and Subsequent Model Hybrid Electric Vehicles, in the Passenger Car, Light-Duty Truck and Medium-Duty Vehicle Classes," as incorporated by reference in Section 1962(d), Title 13, California Code of Regulations.

**(d) List of Compliant Vehicles**

Upon adoption of this rule and every six months thereafter, the Executive Officer shall publish a list of engines and associated vehicle models certified by California Air Resources Board (CARB) that fleet operators can choose from to comply with paragraph (e) of this rule.

(1) Upon the date of adoption of this rule, any light- or medium-duty vehicle that has been certified by the ARB that meets the LEV, ULEV, SULEV, or ZEV emission standards shall be included in the list.

(2) Upon determination by the Executive Officer that at least 50 percent of new light-duty vehicle sales in California consist of sales of ULEVs or equivalent vehicles, the list shall consist of any light-duty vehicle that has been certified by the CARB that meet the ULEV, SULEV, or ZEV emission standards.

(3) Upon determination by the Executive Officer that at least 50 percent of new medium-duty vehicle sales in California consist of sales of ULEVs or equivalent vehicles, the list shall consist of any medium-duty vehicle that has been certified by the CARB that meet the ULEV, SULEV, or ZEV emission standards.

**(e) Fleet Requirements**

(1) Beginning July 1, 2001, public fleet operators of 15 or more vehicles shall procure from the list published by the Executive Officer as required under paragraph (d), or otherwise certified by CARB as equivalent low-emitting gasoline or alternative-fuel vehicles, when adding or replacing vehicles to their vehicle fleet.

(2) Public fleet operators shall specify the purchase of compliant vehicles as part of their procurement bid request specifications.

(3) Notwithstanding subparagraphs (e)(1) and (e)(2) public fleet operators may purchase a gasoline- or diesel-fueled medium-duty vehicle that is not certified as LEV or cleaner if:

(A) The public fleet operator has sufficient prior purchases as of July 1, 2001 of alternative-fueled vehicles in the existing fleet that have been certified as ULEV, SULEV, or ZEV that would offset the emissions associated with the gasoline- or diesel-fueled vehicle as specified under subparagraph (e)(4); or

(B) The public fleet operator purchases concurrently with the medium-duty vehicle, alternative-fueled vehicles in sufficient quantities that have been certified as SULEV or ZEV that would



offset the emissions associated with the gasoline- or diesel-fueled vehicle as specified under subparagraph (e)(4).

(4) The following formulas shall be used for the purpose of offsetting the emissions associated with the purchase of a gasoline- or diesel-fueled vehicle or engine pursuant to subparagraph (e)(3):

One (1) gasoline- or diesel-fueled medium-duty vehicle or engine is equivalent to:

One (1) alternative-fueled light- or medium-duty ZEV or

Two (2) alternative-fueled light- or medium-duty SULEV or

Ten (10) alternative-fueled light-duty ULEV or

Three (3) alternative-fueled medium-duty ULEV

(5) Public fleet operators may purchase used vehicles that are not certified as LEV or cleaner if the used vehicles are converted to run at LEV or cleaner levels through the use of CARB certified conversion kits.

**(f) Exemptions**

The provisions of this rule shall not apply to the following:

(1) Emergency or rescue vehicles operated by local, state, and federal law enforcement agencies, police and sheriffs department, fire department, hospital, medical or paramedic facility, and used for responding to situations where potential threats to life or property exist, including but not limited to fire, ambulance calls, or life-saving calls.

(2) Vehicles used by law enforcement agencies for the purpose of surveillance or undercover operations.

(3) Heavy-duty on-road vehicles.

(4) Fleets consisting of evaluation/test vehicles, provided or operated by vehicle manufacturers for testing or evaluation, exclusively.

(5) Privately owned or operated light- or medium-duty fleets that provide contract services to public agency.

(6) Signed contract agreements as of the date of adoption of this rule for the purchase or lease of new light- or medium-duty vehicles.

(7) Non-passenger car military fleet vehicles.

(8) Upon demonstration to the Executive Officer, medium-duty vehicles for which LEV or cleaner engine and chassis configuration is not available commercially and the operator cannot make use of subparagraph (e)(3).

**(g) Compliance Auditing and Enforcement**

(1) The fleet operator shall provide at the request of the District any files and/or records created to comply with subdivision (e) including fleet-specific purchase information, such as a list of official DMV registrations, and manufacturer, model-year, model, engine family number, and fuel type of each fleet vehicle. The fleet operator shall keep all required records for a minimum of two years.

(2) Any fleet operator seeking an exemption under subdivision (f) shall supply proof that their vehicle or fleet is exempted from this rule when requested by the District.



**(h) Severability**

If any provision of this rule is held by judicial order to be invalid, or invalid or inapplicable to any person or circumstance, such order shall not affect the validity of the remainder of this rule, or the validity or applicability of such provision to other persons or circumstances. In the event any of the exceptions to this rule is held by judicial order to be invalid, the persons or circumstances covered by the exception shall instead be required to comply with the remainder of this rule.

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# ATTACHMENT 1
## List of Certified Engines Qualifying Under Paragraph (e)

### MODEL YEAR 2000 - PASSENGER CARS

**(This attachment will be updated by January 1, 2001)**

| Low-Emission Vehicles Passenger Car Manufacturer | Fuel | Veh Type | Engine Family | Vehicle Model |
|---|---|---|---|---|
| AUDI | Gaso | DED | YADXV02.8334 | A4/A4 AVANT, A4, A4 AVANT, PASSAT, PASSAT VARIANT |
| AUDI | Gaso | DED | YADXV01.8332 | A4, A4 QUATTRO, PASSAT, PASSAT WAGON, A4 WAGON QUATTRO |
| BMW | Gaso | DED | YBMXV02.8LEV | 528i, 528iA |
| BMW | Gaso | DED | YBMXV04.4LEV | 740i, 740i Sport, 740iL, 740iL Protection |
| BMW | Gaso | DED | YBMXV05.4LEV | 750iL, 750iL PROTECTION |
| CHRYSLER/DODGE | Gaso | DED | YCRXV0148V30 | BREEZE, CIRRUS, STRATUS |
| DODGE/PLYMOUTH | Gaso | DED | YCRXV0122V30 | NEON |
| CHRYSLER/DODGE | Gaso | DED | YCRXV0165V30 | CONCORDE, INTREPID |
| DODGE/PLYMOUTH | Gaso | DED | YCRXV0122V31 | BREEZE, STRATUS |
| CHRYSLER/DODGE | Gaso | DED | YCRXV0215V30 | 300 M, CONDORDE LXI, INTREPID, INTREPID R/T, LHS |
| DAEWOO | Gaso | DED | XDWXV02.2D02 | NUBIRA 2.0-NB, HB, WGN |
| DAEWOO | Gaso | DED | XDWXV01.6D02 | LANOS 1.6-HB AND NB |
| DAEWOO | Gaso | DED | XDWXV01.6D02 | LANOS 1.6-NB |
| FORD | Gaso | FF | YFMXV03.0VF9 | TAURUS FFV ETHANOL |
| LINCOLN | Gaso | DED | YFMXV03.9VF5 | LS8 |
| FORD | Gaso | DED | YFMXV03.0VF2 | LINCOLN LS6 |
| FORD, MERCURY | Gaso | DED | YFMXV03.0VF5 | TAURUS, TAURUS WAGON, SABLE, SABLE WAGON |
| FORD | Gaso | DED | YFMXV02.0VF5 | ESCORT ZX2, ESCORT S/R |
| FORD, MERCURY | Gaso | DED | YFMXV03.0VF3 | TAURUS, TAURUS WAGON, SABLE, SABLE WAGON |
| FORD | Gaso | DED | YFMXV03.8VF5 | MUSTANG |
| FORD | Gaso | DED | YFMXV02.0VF3 | FOCUS SDN/WGN |
| FORD, MERCURY, LINCOLN | Gaso | DED | YFMXV04.6VFR | CROWN VICTORIA, GRAND MARQUIS, TOWN CAR |
| FORD | Gaso | DED | YFMXV02.0VF2 | FOCUS SDN/WGN |
| SUBARU | Gaso | DED | YFJXV02.5JEH | LEGACY, FORESTER, IMPREZA |
| CHERVOLET, OLDSMOBILE, PONTIAC | Gaso | DED | YGMXV03.8043 | MALIBU |

DED= Dedicated; Dual Fuel; FF= Flexible Fuel; Elec = Electric; CNG = Compressed Natural Gas; Gaso = Gasoline. N/A = Not Applicable

| Low-Emission Vehicles Passenger Car Manufacturer | Fuel | Veh Type | Engine Family | Vehicle Model |
|---|---|---|---|---|
| SATURN | Gaso | DED | YGMXV01.9002 | SC/SL/SW |
| CADILLAC | Gaso | DED | YGMXV03.0061 | CATERA |
| CHEVROLET | Gaso | DED | YGMXV05.7084 | CORVETTE (A4,M6) |
| OLDSMOBILE | Gaso | DED | YGMXV04.6066 | AURORA |
| CHEVROLET,PONTIAC | Gaso | DED | YGMXV05.7083 | CAMARO, FIREBIRD/TRANS AM |
| OLDSMOBILE | Gaso | DED | YGMXV03.5064 | AURORA |
| CHEVROLET, PONTIAC | Gaso | DED | YGMXV02.4022 | SUNFIRE(AUTO), CAVALIER(AUTO) |
| HONDA | Gaso | DED | YHNXV02.0MA3 | S2000 |
| HONDA | Gaso | DED | YHNXV01.6CA3 | CIVIC COUPE DX/SE, CIVIC SEDAN DX/LX/EX/DX-V, CIVIC HB CX/DX |
| HONDA | Gaso | DED | YHNXV03.0FA3 | ACCORD EX V6 COUPE/SEDAN, LX V6 COUPE/SEDAN |
| ACURA | Gaso | DED | YHNXV03.2AA3 | NSX (AUTO) |
| HONDA | Gaso | DED | YHNXV02.3PA3 | ACCORD DX SEDAN |
| HONDA | Gaso | DED | YHNXV01.6TA3 | CIVIC COUPE EX / Si, CIVIC SEDAN EX, 1.6EL RS/TS, 1.6EL RS/TS/XS |
| HONDA | Gaso | DED | YHNXV02.3PF2 | ACCORD LX/EX COUPE, ACCORD LX/EX SEDAN |
| HONDA | Gaso | DED | YHNXV03.5YA3 | 3.5RL |
| HYUNDAI | Gaso | DED | YHYXV01.5G3S | ACCENT |
| HUYNDAI | Gaso | DED | YHYXV02.0G3S | ELANTRA SEDAN/ WAGON, TRIBURON COUPE |
| CHEVROLET | Gaso | DF | YTJXV02.2022 | CAVALIER |
| CHEVROLET | CNG | DF | YTJXV02.2022 | CAVALIER |
| JAGUAR | Gaso | DED | YJCXV04.0BN4 | 4-DR SEDANS, 2-DR SPORTS, CONVERTIBLE |
| KIA | Gaso | DED | YKMXV01.8A03 | SEPHIA |
| MAZDA | Gaso | DED | YTKXV01.8VFM | PROTÉGÉ |
| MAZDA | Gaso | DED | YTKXV01.8VFN | MX-5 MIATA |
| MERCEDES-BENZ | Gaso | DED | YMBXV05.0GNB | S430, E430, SL500, S500 |
| MERCEDES-BENZ | Gaso | DED | YMBXV05.5GNB | E55 AMG |
| MERCEDES-BENZ | Gaso | DED | YMBXV05.0GNB | S 430, E430(RWD), E430(4WD-FT), SL500, S500 |
| MERCEDES-BENZ | Gaso | DED | YMBXV03.2GNB | C 280, CLK320 |
| MITSUBISHI | Gaso | DED | YMTXV01.8GNG | MIRAGE |
| MITSUBISHI | Gaso | DED | YMTXV01.5GND | MIRAGE |
| MITSUBISHI | Gaso | DED | YMLXV03.5GNG | DIAMANTE |

DED= Dedicated; Dual Fuel; FF= Flexible Fuel; Elec = Electric; CNG = Compressed Natural Gas; Gaso = Gasoline; N/A = Not Applicable

| Low-Emission Vehicles Passenger Car Manufacturer | Fuel | Veh Type | Engine Family | Vehicle Model |
|---|---|---|---|---|
| MITSUBISHI | Gaso | DED | YDSXV02.4GNG | ECLIPSE, GALANT |
| MITSUBISHI | Gaso | DED | YDSXV03.0GNG | ECLIPSE |
| NISSAN | Gaso | DED | YNSXV03.036A | MAXIMA, I30 |
| INFINITY | Gaso | DED | YNSXV02.0C9B | G20 |
| NISSAN | Gaso | DED | YNSXV02.0C9B | SENTRA |
| NISSAN | Gaso | DED | YNSXV02.433A | ALTIMA |
| CHEVROLET | Gaso | DED | YNTXV01.8FFA | PRIZM |
| SAAB | Gaso | DED | YSAXV02.3TV2 | 9-3 CONVERTIBLE, 9-3 VIGGEN, 0-3 VIGGEN W/CONVERTIBLE, 9-5 WAGON |
| SAAB | Gaso | DED | YSAXV02.3TE2 | 9-5 WAGON |
| SUZUKI | Gaso | DED | YSKXV1.84LHS | ESTEEM SEDAN/WAGON |
| CHEVROLET , SUZUKI | Gaso | DED | YSKXV1.30LNA | METRO HATCHBACK, METRO SEDAN, SWIFT HACTHBACK |
| TOYOTA | Gaso | DED | YTYXV03.0FFC | AVALON |
| TOYOTA | Gaso | DED | YTYXV03.0FXB | CAMRY, CAMRY SOLARA, CAMRY SOLARA CONVERTIBLE |
| TOYOTA | Gaso | DED | YTYXV01.5FFA | ECHO |
| LEXUS | Gaso | DED | YTYXT03.0FFE | RX 300, RX 300 4WD |
| LEXUS | Gaso | DED | YTYXV03.0FFD | GS 300 |
| TOYOTA | Gaso | DED | YTYXV01.8FFD | MR2 |
| TOYOTA | Gaso | DED | YTYXV01.8FFA | COROLLA |
| VOLKSWAGEN | Gaso | DED | YVWXV02.0227 | JETTA, GOLF, NEW BEETLE |
| VOLKSWAGEN | Gaso | DED | YVWXV02.8224 | JETTA GLX VR6, GOLF GTI VR6 |
| VOLVO | Gaso | DED | YVVXV1.95MJ1 | S40/V40 |
| VOLVO | Gaso | DED | YVVXV2.43TF3 | S70/V70 |
| VOLVO | Gaso | DED | YVVXV2.92BU3 | S80 |
| VOLVO | Gaso | DED | YVVXV2.43PA3 | V70/V70XC/S70, S70/V70/C70, V70 |

| Ultra-Low-Emission Vehicles Passenger Car Manufacturer | Fuel | Veh Type | Engine Family | Vehicle Model |
|---|---|---|---|---|
| CHRYSLER | Gaso | DED | YCRXV0122V41 | NEON |
| CHRYSLER | Gaso | DED | YCRXV0122V40 | NEON |
| FORD | CNG | DED | YFMXV04.6VP5 | CROWN VICTORIA CNG |
| PONTIAC, BUICK, CHEVROLET | Gaso | DED | YGMXV03.8901 | BONNEVILLE, LE SABRE, PARK AVENUE, IMPALA, GRAND PRIX, REGAL |
| PONTIAC, BUICK, CHEVROLET | Gaso | DED | YGMXV03.8044 | BONNEVILLE, IMPALA, LUMINA, MONTE CARLO, LE SABRE, REGAL, PARK AVENUE, GRAND PRIX |
| HONDA | Gaso | DED | YHNXV02.3PL4 | ACCORD EX, LX SEDAN, EX, LX COUPE |
| HONDA | Gaso | DED | YHNXV03.2GL4 | 3.2TL |
| HONDA | Gaso | DED | YHNXV01.0LA4 | INSIGHT |
| MAZDA | Gaso | DED | YTKXV01.6VJM | PROTEGE |
| MAZDA | Gaso | DED | YTKXV02.0VJM | 626 |
| TOYOTA | CNG | DED | YTYXV02.2PPA | CAMRY (CNG) |
| TOYOTA | Gaso | DED | YTYXV02.2JJB | CAMRY, CAMRY SOLARA, CAMRY SOLARA CONVERTIBLE |

DED= Dedicated, Dual Fuel; FF= Flexible Fuel; Elec = Electric; CNG = Compressed Natural Gas; Gaso = Gasoline; N/A = Not Applicable

| Super Ultra-Low-Emission Vehicles Passenger Car Manufacturer | Fuel | Veh Type | Engine Family | Vehicle Model |
|---|---|---|---|---|
| HONDA | Gaso | DED | YHNXV02.3NL5 | ACCORD |
| HONDA | CNG | DED | YJNXV01.6KA5 | CIVIC GX |
| NISSAN | Gaso | DED | YNSXV01.85BA | SENTRA CA 4-DR |

| Zero-Emission Vehicles Passenger Car Manufacturer | Fuel | Veh Type | Engine Family | Vehicle Model |
|---|---|---|---|---|
| General Motors EV-1 | Elec | DED | N/A | EV-1 |
| Honda EV Plus | Elec | DED | N/A | EV Plus |
| Hyundai Accent EV | Elec | DED | N/A | Accent EV |
| Nissan Altra EV | Elec | DED | N/A | Altra EV |
| Solectria FORCE | Elec | DED | N/A | FORCE |
| General Motors S-10 | Elec | DED | N/A | S-10 |
| Toyota RAV 4 EV | Elec | DED | N/A | RAV 4 EV |

DED = Dedicated, Dual Fuel, FF = Flexible Fuel, Elec = Electric, CNG = Compressed Natural Gas, Gaso = Gasoline
N/A = Not Applicable

## MODEL YEAR 2000 - LIGHT-DUTY TRUCKS

| Low-Emission Vehicles<br>Light-duty Truck Manufacturer | Fuel | Veh Type | Engine Family | Vehicle Model |
|---|---|---|---|---|
| up to 3,750 lbs | | | | |
| CHRYSLER | Gaso | DED | YCRXT0242130 | CHEROKEE CLASSIC 2WD, LIMITED 2WD, SE 2WD/4WD, SE 2WD RHD, SPORT 2WD/4WD |
| FORD, MAZDA | Gaso | DED | YFMXT02.51FC | RANGER PICKUP 2WD (AUTO), B2500 2WD (AUTO) |
| FORD, MAZDA | Gaso | DED | YFMXT04.01F5 | RANGER PICKUP 2WD (AUTO), B4000 2WD (AUTO) |
| CHERVOLET, GMC, ISUZU | E85 | FF | YGMXT02.2122 | S10 PICKUP 2WD, SONOMA 2WD, HOMBRE PICKUP 2WD |
| CHEVROLET, GMC | Gaso | DED | YGMXT04.3187 | S10 PICKUP 2WD(AUTO), SONOMA 2WD(AUTO) |
| CHERVOLET, GMC, ISUZU | Gaso | FF | YGMXT02.2122 | S10 PICKUP 2WD, SONOMA 2WD, HOMBRE PICKUP 2WD |
| KIA | Gaso | DED | YKMXT02.0B03 | SPORTAGE |
| SUZUKI | Gaso | DED | YSKXT2.49LHA | GRAND VITARA |
| CHEVROLET, SUZUKI | Gaso | DED | YSKXT1.59LMA | TRACKER, VITARA |
| CHEVROLET, SUZUKI | Gaso | DED | YSKXT2.00LMA | TRACKER, VITARA |
| TOYOTA | Gaso | DED | YTYXT03.4FFH | TACOMA-2WD |
| TOYOTA | Gaso | DED | YTYXT02.0FFJ | RAV4 2WD, RAV4 4WD, RAV4 SOFT TOP 2WD/4WD |
| TOYOTA | Gaso | DED | YTYXT02.7FFJ | TACOMA-2WD, TACOMA-4WD |
| TOYOTA | Gaso | DED | YTYXT02.4FFJ | TACOMA 2WD |
| > 3,750 lbs | | | | |
| BMW | Gaso | DED | YBMXT04.4E53 | X5 |
| CHRYSLER | Gaso | DED | YCRXT0287231 | GRAND CHEROKEE (LAREDO 2WD/4WD, LIMITED 2WD/4WD) |
| DODGE/PLYMOUTH | Gaso | DED | YCRXT0148230 | CARAVAN 2WD, VOYAGER 2WD |
| DODGE | Gaso | DED | YCRXT0287232 | DAKOTA PICKUP 2WD/4WD |
| CHRYSLER,DODGE,PLYMOUTH | Gaso | DED | YCRXT0232230 | CARAVAN LE/SE 2WD, GRAND CARAVAN ES/LE/SE 2WD, GRAND VOYAGER SE 2WD, TOWN & COUNTRY LX/SX/LIMITED 2WD, VOYAGER SE 2WD |
| CHRYSLER,DODGE,PLYMOUTH | Gaso | DED | YCRXT0201230 | CARAVAN 2WD, CARAVAN LE/SE 2WD, GRAND CARAVAN LE/SE 2WD, GRAND VOYAGER 2WD, GRAND VOYAGER SE 2WD, TOWN & COUNTRY LX/SX 2WD, VOYAGER 2WD, VOYAGER SE 2WD |

DED= Dedicated; FF= Flexible Fuel; E85 = 85% Ethanol; Elec = Electric; CNG = Compressed Natural Gas; Gaso = Gasoline; N/A = Not Applicatble

| Low-Emission Vehicles Light-duty Truck Manufacturer | Fuel | Veh Type | Engine Family | Vehicle Model |
|---|---|---|---|---|
| CHRYSLER JEEP | Gaso | DED | YCRXT0242230 | CLASSIC 4WD, LAREDO 2WD, LIMITED 2WD/4WD, SE 4WD. SAHARA 4WD, SPORT 4WD |
| FORD, MERCURY | Gaso | DED | YFMXT04.02F3 | EXPLORER 2WD/4WD (AUTO), MOUNTAINEER 4WD(AUTO) |
| FORD, MERCURY | Gaso | DED | YFMXT05.02F5 | EXPLORER 2WD/4WD (AUTO), MOUNTAINEER 4WD(AUTO) |
| MERCURY | Gaso | DED | YFMXT03.335B | VILLAGER FWD WAGON |
| FORD, MAZDA | Gaso | DED | YFMXT04.02F2 | RANGER PICKUP 2WD/4WD(AUTO), B4000 2WD/4WD(AUTO), EXPLORER 2WD/4WD |
| FORD | Gaso | DED | YFMXT04.22FC | F-150 PICKUP 2WD/4WD |
| FORD, MERCURY | Gaso | DED | YFMXT04.02F4 | EXLORER 2WD/4WD (AUTO), MOUNTAINEER 2WD/4WD (AUTO) |
| FORD | Gaso | DED | YFMXT03.02F5 | WINDSTAR |
| CHEVROLET, PONTIAC, OLDSMOBILE | Gaso | DED | YGMXT03.4142 | VENTURE FWD, MONTANA FWD, SILHOUETTE FWD |
| CHEVROLET, GMC, ISUZU, OLDSMOBILE | Gaso | DED | YGMXT04.3188 | S10 PICKUP 2WD/4WD, BLAZER 2WD, SONOMA 2WD/4WD, JIMMY 2WD/4WD, HOMBRE PICKUP 4WD, BLAZER 2WD/4WD, JIMMY 2WD/4WD, BRAVADA AWD, ASTRO 2WD CARGO/PASSENGER (AUTO), ASTRO AWD CARGO (AUTO), SAFARI 22WD CARGO/PASSENGER (AUTO), SAFARI AWD CARGO (AUTO) |
| HONDA | Gaso | DED | YHNXT03.5EA3 | ODYSSEY EX / LX / VAN |
| ISUZU, HONDA | Gaso | DED | YSZXT03.52JK | RODEO, PASSPORT |
| MAZDA | Gaso | DED | YTKXT02.52FM | MPV |
| MITSUBISHI | Gaso | DED | YMTXT03.5GNH | MONTERO |
| MITSUBISHI | Gaso | DED | YMTXT03.0GNG | MONTERO SPORT 2WD/4WD |
| MITSUBISHI | Gaso | DED | YMTXT03.5GNG | MONTERO SPORT 2WD/4WD |
| NISSAN | Gaso | DED | YNSXT03.335B | QUEST VAN |
| NISSAN | Gaso | DED | YNSXT03.335A | FRONTIER V6 TRUCK |
| TOYOTA | Gaso | DED | YTYXT03.0FFS | SIENNA |
| TOYOTA | Gaso | DED | YTYXT03.4FFR | TUNDRA 2-WHEEL DRIVE, TUNDRA 4-WHEEL DRIVE |
| TOYOTA | Gaso | DED | YTYXT02.7FFR | 4RUNNER 2WD, 4RUNNER 4WD, TACOMA 4WD |
| | | | | |

DED= Dedicated, FF = Flexible Fuel; E85 = 85% Ethanol; Elec = Electric; CNG = Compressed Natural Gas; Gaso = Gasoline; N/A = Not Applicable

| Ultra-Low-Emission Vehicles Light-duty Truck Manufacturer | Fuel | Veh Type | Engine Family | Vehicle Model |
|---|---|---|---|---|
| FORD | Gaso | DED | YFMXT03.82JC | WINDSTAR |
| FORD | Gaso | DED | YFMXT03.82J5 | WINDSTAR |
| | | | | |
| Zero-Emission Vehicles Light-duty Truck Manufacturer | Fuel | Veh Type | Engine Family | Vehicle Model |
| Dodge Caravan | Elec | DED | N/A | Caravan |
| Ford Ranger pickup | Elec | DED | N/A | Ranger |
| Plymouth Voyager Epic EV | Elec | DED | N/A | Voyager Epic EV |
| Plymouth Voyager EV | Elec | DED | N/A | Voyager EV |

DED= Dedicated; FF= Flexible Fuel; E85 = 85% Ethanol; Elec = Electric; CNG = Compressed Natural Gas; Gaso = Gasoline; N/A = Not Applicatble

## MODEL YEAR 2000 - MEDIUM-DUTY TRUCKS

| Low-Emission Vehicles Medium-duty Truck Manufacturer | Fuel | Veh Type | Engine Family | Vehicle Model |
|---|---|---|---|---|
| BMW | Gaso | DED | YBMXT04.453M | X5 |
| DODGE | Gaso | DED | YCRXA0360H32 | DAKOTA PICKUP 4WD, DURANGO 2WD/4WD SUV |
| DODGE | Gaso | DED | YCRXA0360J31 | RAM 1500 PICKUP 4WD, RAM 2500/3500 PICKUP 4WD, 2500 PICKUP HDV 2WD/4WD, 3500 PICKUP 2WD HDV |
| DODGE | Gaso | DED | YCRXA0360H31 | RAM 1500 PICKUP 2WD/4WD |
| | | | | |
| FORD | Gaso | DED | YFMXA05.4JGP | F-250 PICKUP 2WD/4WD; F-350 PICKUP 2WD/4WD; EXCURSION 2WD/4WD (AUTO) |
| FORD | Gaso | DED | YFMXA05.4HGC | F150 PICKUP 2WD/4WD SHORT WHEEL BASE (AUTO), F-150 PICKUP 2WD/4WD LONG WHEELBASE (AUTO) |
| FORD, LINCOLN | Gaso | DED | YFMXA05.4RF7 | EXPEDITION 2WD, EXPEDITION 2WD/4WD, NAVIGATOR 2WD/4WD (4-VALVE), F-150 PICKUP 2WD/4WD SHORT WHEELBASE (AUTO) |
| FORD | Gaso | DED | YFMXA04.6HGC | F-150 PICKUP 2WD/4WD SHORT WHEEL BASE |
| FORD | Gaso | DED | YFMXA06.8JGC | E350 2WD |
| FORD | Gaso | DED | YFMXA04.2JGC | E-150 ECONOLINE 2WD, E-250 ECONOLINE 2WD, E-250 CAB CHASSIS 2WD, E-250 STRIP CHASSIS 2WD, E-150 CLUB |
| FORD | Gaso | DED | YFMXA04.66FF | EXPEDITION 2WD, EXPEDITION 2WD/4WD, E-150 ECONOLINE 2WD, E-150 CLUB WAGON |
| FORD | Gaso | DED | YFMXA04.2HGC | E-150 ECONOLINE 2WD |
| FORD | Gaso | DED | YFMXA06.8JGN | F250 PICKUP 2WD/4WD, F350 PICKUP 2WD/4WD, EXCURSION 2WD/4WD |
| CHEVROLET, GMC | Gaso | DED | YGMXA05.3184 | C1500 TAHOE 2WD, K1500 TAHOE 4WD, C1500 YUKOU 2WD, K1500 YUKOU 4WD, C1500 SUBURBAN 2WD, K1500 SUBURBAN 4WD, C1500 YUKOU XL 2WD, K1500 YUKOU XL 4WD |
| CHEVROLET, GMC | Gaso | DED | YGMXA04.3192 | G1500/G2500 VAN 2WD, G1500/G2500 EXPRESS 2WD, G1500/G2500 SAVANA PASSENGER VAN, G1500/G2500 SAVANA 2WD |
| CHEVROLET, GMC | Gaso | DED | YGMXA05.3183 | K-1500 SILVERADO 4WD, K1500 SIERRA 4WD, C1500 SILVERADO 2WD, C1500 SIERRA 2WD |

| Low-Emission Vehicles Medium-duty Truck Manufacturer | Fuel | Veh Type | Engine Family | Vehicle Model |
|---|---|---|---|---|
| CHEVROLET, GMC | Gaso | DED | YGMXA05.7194 | C1500 TAHOE 2WD, C1500 YUKON 2WD |
| CHEVROLET, GMC, CADILLAC | Gaso | DED | YGMXA05.7185 | G1500/G2500 VAN 2WD, G1500/G2500 EXPRESS 2WD, G1500/G2500 SAVANA PASSENGER VAN, K1500 TAHOE 4WD, K1500 YUKON 4WD, ESCALADE 4WD, C1500 SUBURBAN 2WD, K1500 SUBURBAN 4WD |
| CHEVROLET, GMC | Gaso | DED | YGMXA04.3190 | C1500 SILVERADO 2WD, K1500 SILVERADO 4WD, C1500 SIERRA 2WD, K1500 SIERRA 4WD |
| MERCEDES-BENZ | Gaso | DED | YMBXT04.3GNB | ML430 |
| MERCEDES-BENZ | Gaso | DED | YMBXV05.5GNB | ML 55 AMG |
| MERCEDES-BENZ | Gaso | DED | YMBXT03.2GNB | ML 320 |
| ROVER, LAND ROVER | Gaso | DED | YLRXT04.6002 | DISCOVERY, RANGE ROVER |
| TOYOTA | Gaso | DED | YTYXT04.7GBX | LAND CRUISER WAGON |
| TOYOTA | Gaso | DED | YTYXT04.7GXW | TUNDRA 2-WEEL DRIVE, TUNDRA 4-WHEEL DRIVE |
| | | | | |
| Ultra-Low-Emission Vehicles Medium-duty Truck Manufacturer | Fuel | Veh Type | Engine Family | Vehicle Model |
| DODGE | Gaso | DED | YCRXA0287H41 | DURANGO 2WD/4WD SUV |
| CHEVROLET, GMC | Gaso | DED | YGMXA04.3189 | ASTRO AWD CARGO/PASSENGER (AUTO); SAFARI AWD CARGO/PASSENGER (AUTO) |
| | | | | |
| Super-Ultra-Low-Emis Vehicles Medium-duty Truck Manufacturer | Fuel | Veh Type | Engine Family | Vehicle Model |
| CHRYSLER | CNG | DED | YCRXT05.26RC | RAM VAN 2500/3500/B3500 2WD, RAM WAGON 2500 W2WD, RAM WAGON 3500 2WD HDV |
| FORD | CNG | DED | YFMXT05.4RP5 | F-150 PICKUP NATURAL GAS |
| FORD | CNG | DED | YFMXT05.4RP6 | E-250 NATURAL GAS, E-350 NATURAL GAS |

DED= Dedicated; CNG = Compressed Natural Gas; Gaso = Gasoline

**ATTACHMENT 4**

**ARB-CERTIFIED ENGINES/VEHICLES**
**NOT QUALIFYING**
**UNDER PROPOSED RULE 1191(e)**

## NON-COMPLIANT VEHICLES FOR RULE 1191
## MODEL YEAR 2000
## PASSENGER CARS

| MANUFACTURER | STD | MAKE COMBO | MODELS COMBO |
|---|---|---|---|
| ASTON MARTIN | TIER 1 | ASTON MARTIN | DB7 VANTAGE COUP, DB7 VANTAGE VOLANTE |
| AUDI | TLEV | AUDI | TT COUPE, TT ROASTER |
| AUDI | TLEV | AUDI | AUDI S4 |
| AUDI | TLEV | AUDI | AUDI S6, A6 QUATTRO, A6 AVANT QUATTRO |
| AUDI | TLEV | AUDI | A8 QUATTRO |
| AUDI | TLEV | AUDI | AUDI S4, AUDI A6 |
| BMW | TLEV | BMW | M ROADSTER, M COUPE |
| BMW | TLEV | BMW | M5, Z8 |
| CHRYLER | TIER 1 | PLYMOUTH | PROWLER |
| CHRYLER | TLEV | CHRYSLER, DODGE | CIRRUS, SEBRING COVERTBLE, STRATUS |
| CHRYLER | TIER 1 | DODGE | BREEZE, STRATUS |
| CHRYLER | TIER 1 | CHRYSLER | VIPER COVERTIBLE, VIPER COUPE |
| FERRARI | TIER 1 | FERRARI | 550 MARANELLO, 456 M |
| FORD | TIER1 | FORD, MERCURY, LINCOLN | CROWN VICTORIA POLICE, GRAND MARQUIS, TOWN CAR |
| FORD | TIER 1 | FORD | MUSTANG COBRA |
| FORD | TLEV | FORD, MERCURY | CONTOUR, MYSTIQUE, COUGAR |
| FORD | TIER1 | FORD, MERCURY | CONTOUR, CONTOUR SVT, MYSTIQUE, COUGAR |
| FORD | TLEV | LINCOLN | CONTINENTAL |
| FORD | TLEV | FORD | MUSTANG GT |
| FORD | TLEV | LINCOLN | LS6 |
| GFI | TLEV | FORD | CONTOUR |

# NON-COMPLIANT VEHICLES FOR RULE 1191
## MODEL YEAR 2000
## PASSENGER CARS

| MANUFACTURER | STD | MAKE COMBO | MODELS COMBO |
|---|---|---|---|
| GM | TIER 1 | OLDSMOBILE, CADILLAC | AURORA, SEVILLE, ELDORADO, DEVILLE |
| GM | TLEV | PONTIAC, CHEVROLET | SUNFIRE (manual), CAVALIER (manual) |
| HONDA | TLEV | HONDA | INTEGRA 3 DR GS-R, INTEGRA 4 DR GS-R |
| HONDA | TIER 1 | HONDA | PRELUDE |
| HONDA | TIER 1 | HONDA | INTEGRA 3 DR TYPE-R, INTEGRA 3 DR TYPE-R |
| HONDA | TLEV | HONDA | INTEGRA 3 DR LS, INTEGRA 3 DR GS, INTEGRA 4 DR LS, INTEGRA 4 DR GS |
| HONDA | TLEV | HONDA | CIVIC COUPE HX |
| HONDA | TLEV | HONDA | CIVIC COUPE Si/SiR |
| HYNDA | TLEV | HUYNDAI | SONATA |
| JAGUAR | TIER 1 | JAGUAR | XJR, VANDEN PLAS, XKR COUPE, XKR CONVERTIBLE |
| JAGUAR | TLEV | JAGUAR | JAGUAR X200 V6 (S-TYPE) |
| JAGUAR | TLEV | JAGUAR | S-TYPE |
| MAZDA | TLEV | MAZDA | 626 |
| MAZDA | TIER 1 | MAZDA | MILLENIA 2.5 L |
| MAZDA | TIER 1 | MAZDA | MILLENIA 2.3 L |
| MERCEDES-BENZ | TIER 1 | MERCEDES-BENZ | SL 600 |
| MERCEDES-BENZ | TLEV | MERCEDES-BENZ | C 230, SLK 230 |
| MMMA | TLEV | CRYSLER, DODGE | SEBRING, AVENGER |
| NISSAN | TIER 1 | NISSAN | Q45 |
| ROLLS-ROYCE | TIER 1 | BENTLEY, ROLLS-ROYCE | CORNICHE |

# NON-COMPLIANT VEHICLES FOR RULE 1191
## MODEL YEAR 2000
## PASSENGER CARS

| MANUFACTURER | STD | MAKE COMBO | MODELS COMBO |
|---|---|---|---|
| ROLLS-ROYCE | TIER 1 | ROLLS-ROYCE | SILVER SERAPH, PARK WARD |
| SAAB | TIER 1 | SAAB | 9-5, 9-5 WAGON |
| SUZUKI | TLEV | SUZUKI | ESTEEM SEDAN/WAGON |
| SUZUKI | TLEV | CHEVROLET | METRO HATCHBACK |
| TOYOTA | TLEV | TOYOTA | CELICA |
| TOYOTA | TIER 1 | TOYOTA | CAMRY, CAMRY SOLARA |
| TOYOTA | TLEV | LEXUS | LS 400, SC 400 |
| TOYOTA | TLEV | LEXUS | SC 300 |
| VOLKSWAGEN | TLEV | VOLKSWAGEN | NEW BEETLE |
| VOLVO | TLEV | VOLVO | S80 |

# NON-COMPLIANT VEHICLES FOR RULE 1191
## MODEL YEAR 2000
## LIGHT-DUTY VEHICLES

| MFR | STD | MAKE COMBO | MODELS COMBO |
|---|---|---|---|
| CHRYSLER | TIER1 | CHRYSLER, DODGE | GRAND CARAVAN ES/LE/SE (AWD), TOWN & COUNTRY LX (AWD), TOWN & COUNTRY LIMITED (AWD) |
| CHRYSLER | TLEV | DODGE | DAKOTA PICKUP 2WD/4WD |
| CHRYSLER | TLEV | DODGE, CHRYSLER | DAKOTA PICKUP 2WD, CHEROKEE SE 2WD/4WD, WRANGLER SE 4WD |
| CHRYSLER | TLEV | DODGE | DAKOTA PICKUP 2WD |
| FORD | TLEV | FORD, MAZDA | RANGER PICKUP FFV ETHANOL 2WD/4WD,B3000 FFV ETHANOL 2WD/4WD |
| FORD | TLEV | FORD | POSTAL VEHICLE |
| FORD | TLEV | FORD, MAZDA | RANGER PICKUP 2WD (MANUAL), B4000 2WD (MANUAL) |
| FORD | TLEV | FORD, MAZDA | RANGER PICKUP 2WD/4WD (MANUAL), B4000 2WD/4WD (MANUAL) |
| FORD | TLEV | FORD, MAZDA | RANGER PICKUP FFV ETHANOL 2WD, B3000 FFV ETHANOL 2WD |
| FORD | TLEV | FORD, MAZDA | RANGER PICKUP 2WD (MANUAL), B2500 2WD (MANUAL) |
| FORD | TLEV | FORD | POSTAL VEHICLE |
| FORD | TIER1 | FORD | FORD F-150 PICKUP 2WD LIGHTNING |
| GM | TLEV | CHEVROLET, GMC | S10 PICKUP 2WD(MANUAL), SONOMA 2WD(MANUAL) |
| HONDA | TLEV | HONDA | CR-V EX/LX |
| ISUZU | TLEV | ISUZU, HONDA | VEHICROSS, RODEO, PASSPORT, AMIGO 4WD |
| ISUZU | TLEV | ISUZU | RODEO 2WD, AMIGO 2WD |
| NISSAN | TLEV | NISSAN | FRONTIER REG CAB/KING CAB |
| NISSAN | TLEV | NISSAN | FRONTIER 4WD REG CAB/KING CAB, XTERRA |
| NISSAN | TLEV | NISSAN, INFINITI | PATHFINDER, QX4 |
| VOLKSWAGEN | TIER1 | VOLKSWAGEN | EUROVAN VR6/MV, EUROVAN GLS VAN, EUROVAN MV POP TOP |

# NON-COMPLIANT VEHICLES FOR RULE 1191
## MODEL YEAR 2000
## MEDIUM-DUTY VEHICLES

| MFR | STD. | MAKE COMBO | MODELS COMBO |
|---|---|---|---|
| CHRYSLER | TIER1 | DODGE | RAM 1500 PICKUP 2WD/4WD, VAN 2500 2WD, WAGON 2500 2WD, 2500 PICKUP 4WD, 3500 PICKUP 4WD, VAN 3500 2WD/4WD |
| CHRYSLER | TIER1 | DODGE | RAM 2500 PICKUP 4WD, 2500 PICKUP HDV 2WD/4WD, 3500 PICKUP 2WD/4WD, 3500 PICKUP 2WD HDV |
| CHRYSLER | TIER1 | DODGE | RAM 3500 PICKUP 4WD |
| CHRYSLER | TIER1 | DODGE | RAM 1500 PICKUP 2WD, RAM 1500 PICKUP 2WD, VAN 1500 2WD, WAGON 1500 2WD |
| CHRYSLER | TIER1 | DODGE | RAM 1500 PICKUP 2WD/4WD, RAM 1500 PICKUP 2WD/4WD, VAN 1500 2WD, WAGON 1500 2WD |
| EUROPA | TIER1 | EUROPA | G500, G500 SPORT, G500 OPEN TOP |
| GM | TIER1 | CHEVROLET, GMC | K2500/3500 PICKUP 4WD, C2500/3500 PICKUP 2WD, K2500/3500 SIERRA 4WD, G3500 SAVANA 2WD PASSENGER, G3500 SAVANA CARGO, C2500/3500 SIERRA 2WD, G3500 EXPRESS 2WD, G3500 VAN 2WD, C2500 SUBURBAN 2WD, K2500 SUBURBAN 4WD, C2500 SUBURBAN 2WD, K2500 SUBURBAN 4WD |
| GM | TIER1 | CHEVROLET, GMC | K-1500 SILVERADO 4WD, K1500 SIERRA 4WD, C1500 SILVERADO 2WD, C1500 SIERRA 2WD |
| GM | TIER1 | CHEVROLET, GMC | G1500 VAN 2WD, G1500 SAVANA CARGO, C1500 TAHOE 4WD,C1500 YUKON 2WD |
| GM | TIER1 | CHEVROLET, GMC, CADILLAC | K1500 TAHOE 4WD, K1500 YUKON 4WD, ESCALADE 4WD, G1500/G2500 VAN 2WD, G1500/G2500 EXPRESS 2WD, G1500/G2500 SAVANA PASSENGER, G1500/G2500 SAVANA 2WD, C1500 SUBURBAN 2WD, K1500 SUBURBAN 4WD, C1500 SUBURBAN 2WD, K1500 SUBURBAN 4WD |
| GM | TIER1 | CHEVROLET, GMC | C2500 SUBURBAN 2WD, K2500 SUBURBAN 4WD, C2500 YUKON XL 2WD, K2500 YUKON XL 4WD |
| GM | TIER1 | CHEVROLET, GMC | C1500 SILVERADO 2WD, K1500 SILVERADO 4WD, C1500 SIERRA 2WD, K1500 SILRRA 4WD, C2500 SIERRA 2WD |
| GM | TIER1 | CHEVROLET, GMC | K2500/3500 PICKUP 4WD, C2500/3500 PICKUP 2WD, C2500/3500 SIERRA 2WD, G1500/2500/3500 SAVANA 2WD CARG, K2500/K3500 SIERRA 4WD,G1500/2500/3500 SAVANA PASSENGER, G1500/2500/3500 EXPRESS 2WD, G1500/2500/3500 VAN 2WD, C2500 SUBURBAN 2WD, K2500 SUBURBAN 4WD |

## NON-COMPLIANT VEHICLES FOR RULE 1191
## MODEL YEAR 2000
## MEDIUM-DUTY VEHICLES

| MFR | STD | MAKE COMBO | MODELS COMBO |
|---|---|---|---|
| GM | TIER1 | CHEVROLET, GMC | C20903, K20903, K30943 (C2500 PICKUP 2WD, K2500/3500 PICKUP 4WD, C2500/3500 SIERRA 2WD, K2500/3500 SIERRA 4WD) |
| WINNEBAGO | TIER1 | WINNEBAGO | RIALTA |

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South Coast Air Quality Management District

*(Adopted June 16, 2000)*

## Rule 1192. Clean On-Road Transit Buses

### (a) Purpose

For public transit fleets operating in the South Coast Air Quality Management (District), this rule requires public transit fleet operators to acquire alternative-fuel heavy-duty vehicles when procuring or leasing these vehicles to reduce air toxic and criteria pollutant emissions.

### (b) Applicability

This rule applies to those public transit fleets with 15 or more public transit vehicle or urban buses, operated by government agencies or operated by private entities under contract to government agencies, that provide passenger transportation services including intra- and intercity shuttle services. This rule shall not apply to vehicles or services pursuant to paragraph (e) including school transportation services, long-distance services, and heavy-duty on-road vehicles not used for the express purpose of public transportation.

No provisions of this rule shall preclude applicability of more stringent regulations developed by the State of California or the federal government imposed on heavy-duty vehicles or urban buses used for the express purpose of transporting passengers.

### (c) Definitions

For purposes of this rule, the following definitions shall apply:

(1) ALTERNATIVE-FUEL HEAVY-DUTY VEHICLE means a heavy-duty vehicle, urban bus or engine that uses compressed or liquified natural gas, propane, methanol, electricity, fuel cells, or other advanced technologies that do not rely on diesel fuel, and meets the emission requirements of Title 13, Section 1956.1 of the California Code of Regulations [adopted by the California Air Resources Board (CARB) on February 24, 2000]. For the purpose of this rule, hybrid-electric and dual-fuel technologies that use diesel fuel are not considered alternative-fuel technologies.

(2) HEAVY-DUTY VEHICLE means any vehicle having a gross vehicle weight of at least 14,000 pounds.

(3) PARATRANSIT VEHICLE means any heavy-duty transit vehicle as defined in Sections 336 and 462 of the California Vehicle Code and has a gross vehicle weight of at least 14,000 pounds but no greater than 33,000 pounds.

(4) PUBLIC TRANSIT VEHICLE means any heavy-duty vehicle used for the express purpose of transporting passengers. A transit vehicle usually has a gross vehicle weight of at least 14,000 pounds but no greater than 33,000 pounds.

(5) PUBLIC TRANSIT FLEET OPERATOR is a person who owns, leases, or operates substantially public transit vehicles or urban buses in the District. A person is any public entity responsible for administering and managing transit activities and services. Public transit fleet operators can directly operate transit service or contract out for all or part of the total transit service provided and includes transit districts, included transit districts, municipal operators, included municipal operators, and transit development board



as defined in Chapter 4, Article 1 of the Public Utilities Code. Public transit fleet operator includes any private transit operator that is contracted by a government agency or a public transit agency.

(6) URBAN BUS means a passenger-carrying vehicle with a gross vehicle weight of at least 33,000 pounds, powered by a heavy heavy-duty diesel engine, or of a type normally powered by a heavy heavy-duty diesel engine, with a load capacity of fifteen (15) or more passengers and intended primarily for intra-city operation, i.e., within the confines of a city or greater metropolitan area. Urban bus operation is characterized by short rides and frequent stops. To facilitate this type of operation, more than one set of quick-operating entrance and exit doors would normally be installed. Since fares are usually paid in cash or token, rather than purchased in advance in the form of tickets, urban buses would normally have equipment installed for collection of fares.

(7) VEHICLE means any self-propelled, motorized device that is permitted to operate on public roads through Department of Motor Vehicle registration or the federal government.

**(d) Fleet Requirements**

(1) Beginning upon adoption of this rule, for public transit fleet operators that are considered transit districts or included transit districts, or any public entity, joint powers agency, or combination thereof that provides public transportation services, with 15 or more transit vehicles or urban buses, except municipal or included municipal operators with fewer than 100 transit vehicles or urban buses, all new transit

vehicle or urban bus purchases or leases must be alternative-fuel heavy-duty vehicles when adding or replacing buses to their vehicle fleet.

(2) Beginning July 1, 2001, for public transit fleet operators that are considered municipal operators or included municipal operators with 15 or more but less than 100 transit vehicles or urban buses, all new transit vehicle or urban bus purchases or leases must be alternative-fuel heavy-duty vehicles when adding or replacing buses to their vehicle fleets.

(3) Private transit operators contracted by a transit agency or government agency shall meet the requirements of either subparagraphs (d)(1) or (d)(2) depending on the transit agency or government agency.

**(e) Exemptions**

(1) The provisions of this rule shall not apply to the following:

(A) Paratransit vehicles.

(B) Buses used for the expressed purpose of providing long-distance service (out-of-District), that are generally equipped with luggage compartments, restrooms, and overhead storage.

(C) No more than ten evaluation/test vehicles per fleet, provided by or operated by vehicle manufacturer for testing or evaluation, exclusively.

(D) School buses as defined in the California Vehicle Code.

(E) Buses that are not used for the express purpose of public transportation such as employee transportation or transportation of prisoners.



(F) Signed contract agreements as of the date of adoption of this rule for the purchase or lease of new transit vehicles or urban buses. This exemption does not apply to execution of options to purchase transit vehicles following the date of adoption of this rule.

(2) Upon demonstration to the Executive Officer, heavy-duty vehicles used for the express purpose of transporting passenger for which no alternative-fuel engine and chassis configuration is available commercially or could be used.

**(f) Compliance Auditing and Enforcement**

(1) The fleet operator shall provide at the request of the District any files and/or records created to comply with subdivision (d) including fleet-specific information, such as a list of official DMV registrations, and manufacturer, model-year, model, engine family number, and fuel type of each fleet vehicle. The fleet operator shall keep all required records for a minimum of two years.

(2) Any fleet operator seeking an exemption under subdivision (e) shall supply proof that their vehicle or fleet is exempted from this rule when requested by the District.

**(g) Severability**

If any provision of this rule is held by judicial order to be invalid, or invalid or inapplicable to any person or circumstance, such order shall not affect the validity of the remainder of this rule, or the validity or applicability of such provision to other persons or circumstances. In the event any of the exceptions to this rule is held by judicial

order to be invalid, the persons or circumstances covered by the exception shall instead be required to comply with the remainder of this rule.

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South Coast Air Quality Management District

*(Adopted June 16, 2000)*

## Rule 1193. Clean On-Road Residential and Commercial Refuse Collection Vehicles

### (a) Purpose

For solid waste collection fleets operating in the South Coast Air Quality Management District (District), this rule requires public and private solid waste collection fleet operators to acquire alternative-fuel refuse collection heavy-duty vehicles when procuring or leasing these vehicles to reduce air toxic and criteria pollutant emissions.

### (b) Applicability

This rule applies to government agencies and private entities that operate solid waste collection fleets with 15 or more solid waste collection vehicles. This rule shall not apply to vehicles or services pursuant to paragraph (e).

### (c) Definitions

For purposes of this rule, the following definitions shall apply:

(1) ALTERNATIVE-FUEL HEAVY-DUTY VEHICLE means a heavy-duty vehicle or engine that uses compressed or liquefied natural gas, liquefied petroleum gas, methanol, electricity, fuel cells, or other advanced technologies that do not rely on diesel fuel.

(2) DUAL-FUEL HEAVY-DUTY VEHICLE means a heavy-duty vehicle equipped with a diesel engine that

uses an alternative fuel (such as compressed or liquefied natural gas, liquefied petroleum gas, methanol, or other advanced technologies) in combination with diesel fuel to enable compression ignition. A dual-fuel engine typically uses the alternative fuel to supply 85 percent of the total engine fuel requirement on a BTU basis. A dual-fuel engine must be certified by CARB to meet an applicable optional nitrogen oxide exhaust emission standard and be fitted with a particulate matter aftertreatment control device that achieves a particulate matter emissions level no greater than the particulate matter emissions level of the latest certified M-100 methanol engine certified by CARB prior to the date of the adoption of this rule.

(3) HEAVY-DUTY VEHICLE means any vehicle having a gross vehicle weight of at least 14,000 pounds.

(4) PUBLIC OR PRIVATE SOLID WASTE COLLECTION FLEET OPERATOR is a person who owns, leases, or operates substantially in the District, solid waste collection, rolloff, or transfer vehicles. A person is a federal, state, county, or city government department or agency; special district such as a sanitation or water district; individual firm; limited liability company; association; partnership; corporation or any other entity that collects, transports, or transfers solid waste, yard waste, or recyclable materials.

(5) ROLLOFF VEHICLE means any heavy-duty vehicle used for the express purpose of transporting waste containers such as open boxes or compactors.

(6) SOLID WASTE means all putrescible and nonputrescible solid, and semisolid wastes, including garbage, trash, refuse, paper, rubbish, ashes, industrial wastes, demolition and construction wastes, abandoned vehicles and parts thereof, discarded home



and industrial appliances, manure, vegetable or animal solid and semisolid wastes, and other discarded solid and semisolid wastes. Solid waste does not include hazardous waste, radioactive waste, or medical waste as defined in Section 40191 (b) of the Public Resources Code.

(7) SOLID WASTE COLLECTION VEHICLE means any heavy-duty vehicle used for the express purpose of collecting solid waste, yard waste, or recyclable materials from residential or commercial establishments. A solid waste collection vehicle is a vehicle having the capability to collect solid waste using, either manual or automated, front, side or rear loaders and generally operates on fixed routes.

(8) TRANSFER VEHICLE means any heavy-duty vehicle used for the express purpose of transferring solid waste. A transfer vehicle is usually a tractor/trailer combination where the trailer is loaded at a processing or transfer station.

(9) VEHICLE means any self-propelled, motorized device that is permitted to operate on public roads through Department of Motor Vehicle registration or the federal government.

**(d) Fleet Requirements**

(1) Beginning July 1, 2001, for public and private solid waste collection fleet operators of 50 or more solid waste collection vehicles; and beginning July 1, 2002, for public and private solid waste collection fleet operators of 15 or more solid waste collection vehicles, or a combined total of 15 or more rolloff, transfer, or solid waste collection vehicles, all additions to an existing fleet, or formation of a new fleet, of solid waste collection vehicles shall be by purchase or lease of:

(A) alternative-fuel heavy-duty vehicles when adding or replacing solid waste collection vehicles to their vehicle fleet; or

(B) Prior to July 1, 2003, dual-fuel heavy-duty vehicles when adding or replacing solid waste collection vehicles.

(2) Beginning July 1, 2001, for public and private solid waste collection fleet operators with a combined total of 15 or more transfer or rolloff vehicles, all additions to an existing fleet, or formation of a new fleet, of transfer or rolloff vehicles shall be by purchase or lease of alternative-fuel or dual-fuel heavy-duty vehicles when adding or replacing transfer or rolloff vehicles.

**(e) Exemptions**

The provisions of this rule shall not apply to the following:

(1) No more than ten evaluation/test vehicles per fleet, provided by or operated by vehicle manufacturer for testing or evaluation, exclusively.

(2) Heavy-duty vehicles not used for the express purpose of collecting solid waste from residential or commercial establishments or transferring of solid waste from a waste transfer station to a landfill.

(3) Upon demonstration to the Executive Officer, any solid waste collection vehicles as required pursuant to paragraph (d) for which no alternative-fuel engine and chassis configuration is available commercially or could be used.

(4) Any vehicle added to or replacing a vehicle in an existing fleet after the applicable implementation date of this rule, as specified in subdivision (d), as long as the purchase contract for acquisition of such



vehicle is signed before the date of adoption of this rule. This exemption does not apply to the execution of options to acquire vehicles where the option is executed after the date of adoption of this rule and where vehicle delivery does not occur until after the applicable implementation date as specified in subdivision (d).

(5) Persons subject to this rule who are unable to comply may apply for a variance with the SCAQMD Hearing Board. (See SCAQMD Regulation V and California Health and Safety Code Sections 42350 through 42372 for information regarding variances.)

(6) Upon demonstration to the Executive Officer that all existing solid waste collection vehicles equipped with 1995 and subsequent model year diesel engines in the fleet, have been equipped CARB certified particulate matter control devices that achieve 71 percent or greater reductions in particulate matter emissions, a fleet operator may purchase dual-fuel vehicles pursuant to subparagraph (d)(1)(B) until July 1, 2003.

**(f) Compliance Auditing and Enforcement**

(1) The fleet operator shall provide at the request of the District any files and/or records created to comply with subdivision (d) including fleet-specific information, such as a list of official DMV registrations, manufacturer, model-year, model, engine family number, fuel type, and fuel usage of each fleet vehicle. The fleet operator shall keep all required records for a minimum of two years.

(2) Any fleet operator seeking an exemption under subdivision (e) shall supply proof that their vehicle or fleet is exempted from this rule when requested by the District.

(3) No later than July 1, 2001, any fleet operator with 15 or more, but fewer than 50 vehicles subject to paragraph (d)(1) shall submit a letter to the Executive Officer outlining the intended source of alternative fuel to be used for compliance purposes.

**(g) Severability**

If any provision of this rule is held by judicial order to be invalid, or invalid or inapplicable to any person or circumstance, such order shall not affect the validity of the remainder of this rule, or the validity or applicability of such provision to other persons or circumstances. In the event any of the exceptions to this rule is held by judicial order to be invalid, the persons or circumstances covered by the exception shall instead be required to comply with the remainder of this rule.

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South Coast Air Quality Management District

*(Adopted August 18, 2000) (Amended October 20, 2000)*

## RULE 1194. COMMERCIAL AIRPORT GROUND ACCESS

**(a) Purpose**

For all public and private fleets that provide passenger transportation services out of commercial airports operating in the South Coast Air Quality Management (District), this rule requires passenger car, light-duty truck, medium-duty transit vehicle, and heavy-duty transit vehicle fleet operators to acquire cleaner burning or alternative-fueled vehicles to reduce air toxic and criteria pollutant emissions when procuring or leasing these vehicles in the District unless otherwise exempt.

**(b) Applicability**

This rule applies to all public and private fleet operators of fifteen (15) or more vehicles operated by the airport authority or any other public or private fleet operators that transport passengers from commercial airports located in the District. This rule shall not apply to public or private fleet operators subject to Rules 1191, 1192, 1193, [adopted June 16, 2000], 1195 [*proposal for school buses*], 1196 [adopted October 20, 2000], and 1186.1 [adopted August 18, 2000].

**(c) Definitions**

For purposes of this rule, the following definitions shall apply:

(1) AIRPORT FLEET OPERATOR is a person who owns, leases, or operates vehicles at commercial airports located in the District for the express purpose of transporting passengers. A person is a public agency that is responsible for airport transportation operation; or any private individual firm, association, franchise, cooperative, organization, partnership, business trust corporation, company, contractor, user, or owner that operates at commercial airports and provides transportation services including taxicab, limousine, passenger shuttles, and courtesy shuttle transportation such as those provided by private vehicle leasing and rental agencies and hotels, or transports passengers to and from commercial airports and/or granted approval by the commercial airport authority to pick up passengers within the jurisdictional boundaries of a commercial airport.

(2) ALTERNATIVE-FUELED VEHICLE means a light- or medium-duty vehicle, or heavy-duty transit vehicle or engine that is not powered by gasoline or diesel fuel.

(3) COMMERCIAL AIRPORT AUTHORITY means any oversight entity that regulates the operations in and out of a commercial airport. A commercial airport authority may be a commission such as an airport or taxicab commission, County Board of Supervisors, or city council.

(4) DMV means California Department of Motor Vehicles.

(5) FLEET VEHICLES means any vehicles including passenger cars, light-duty trucks, or medium- and heavy-duty on-road vehicles used to provide public transportation, owned, leased, or operated by an public or private airport fleet operator that totals 15 or



more vehicles. In addition, only those vehicles operated substantially or dedicated to operate at all commercial airports should be counted when accounting for the number of fleet vehicles operating at commercial airports. An airport fleet operator may own, lease, or operate vehicles out of several commercial airports in the District and all vehicles operated by the operator shall be added together in calculating the total number of fleet vehicles.

(6) HEAVY-DUTY TRANSIT VEHICLE means any vehicle having a gross vehicle weight of at least 14,000 pounds that is used for the express purpose of providing public transportation or employee transportation.

(7) MEDIUM-DUTY VEHICLE means any vehicle having a gross vehicle weight of more than 6,000 pounds and less than 14,000 pounds that is used for the express purpose of providing public transportation or employee transportation.

(8) PASSENGER CAR means any vehicle designed primarily for transportation of persons and having a design capacity of twelve (12) persons or less. A passenger van or minivan is considered a passenger car for the purposes of this rule.

(9) SUPER-ULTRA-LOW-EMISSION VEHICLE (SULEV) means any vehicle certified to super-ultra-low-emission standards set forth in the "California Exhaust Emission Standards and Test Procedures for 1988-2000 Model Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles" and "California Exhaust Emission Standards and Test Procedures for 2001 and Subsequent Model Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles," as incorporated by reference in Sections 1960.1(k) and 1961(d), Title 13, California Code of Regulations.

(10) ULTRA-LOW-EMISSION VEHICLE (ULEV) means any vehicle certified to ultra-low-emission standards set forth in the "California Exhaust Emission Standards and Test Procedures for 1988-2000 Model Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles" and "California Exhaust Emission Standards and Test Procedures for 2001 and Subsequent Model Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles," as incorporated by reference in Sections 1960.1(k) and 1961(d), Title 13, California Code of Regulations.

(11) VEHICLE means any self-propelled, motorized device that is permitted to operate on public roads through DMV registration.

(12) ZERO-EMISSION VEHICLE (ZEV) means any vehicle certified to the zero-emission standards set forth in the "California Exhaust Emission Standards and Test Procedures for 2003 and Subsequent Model Zero-Emission Vehicles, and 2001 and Subsequent Model Hybrid Electric Vehicles, in the Passenger Car, Light-Duty Truck and Medium-Duty Vehicle Classes," as incorporated by reference in Section 1962(d), Title 13, California Code of Regulations.

**(d) Fleet Purchase Requirements**

(1) Beginning July 1, 2001, for airport fleet operators providing limousine or transit shuttle services out of commercial airport terminals to the public through the collection of fares or fees, or provide courtesy pickup services out of commercial airport terminals, all new purchases or leases of passenger cars or medium-duty vehicles used to pick up passengers at commercial airport terminals shall be a vehicle that has been certified by CARB that meets the ULEV, SULEV, or ZEV emission standards when adding or



replacing a passenger car or medium-duty vehicle to their fleet.

(2) For shuttle van services that provide multiple-party passenger transportation services to commercial airport terminals and do not operate on fixed or scheduled routes:

(A) Beginning July 1, 2001, 50 percent of all new purchases or leases of vehicles used to transport passengers in and out of commercial airport terminals, shall be vehicles that are certified by CARB to meet ULEV, SULEV, or ZEV emission standards when adding or replacing a passenger car or medium-duty vehicle to their fleet.

(B) Beginning July 1, 2002, 100 percent of all new purchases or leases of vehicles used to transport passengers in and out of commercial airport terminals, shall be vehicles that are certified by CARB to meet ULEV, SULEV, or ZEV emission standards when adding or replacing a passenger car or medium-duty vehicle to their fleet.

(3) Beginning July 1, 2001, for airport fleet operators providing transit shuttle services to the public in and out of airport terminals to airport parking lots, car rental lots, or hotels/motels, all new heavy-duty transit vehicle purchases or leases shall be alternative-fueled vehicles when adding or replacing transit vehicles to their vehicle fleet.

(4) Beginning January 1, 2002, for airport fleet operators providing taxicab pickup services out of commercial airport terminals through the collection of fares or fees, all new purchases or leases of passenger cars or medium-duty vehicles used to pick up passengers at commercial airport terminals shall be a vehicle that

has been certified by CARB that meets the ULEV, SULEV, or ZEV emission standards when adding or replacing a passenger car or medium-duty vehicle to their fleet.

(5) Vehicles acquired pursuant to paragraph (d)(4) must be operated within the South Coast Air Quality Management District for a minimum of three years if funding to offset the purchase cost, less $10,000 in accordance with paragraph (e)(3), was made available.

(6) Prior to January 1, 2002, airport fleet operators voluntarily purchasing an alternative-fueled vehicle meeting requirements of paragraph (d)(4) after adoption of this rule, may apply for funding to offset the purchase cost, less $10,000 in accordance with paragraph (e)(3).

**(e) Exemptions**

The provisions of this rule shall not apply to the following:

(1) Buses used for the express purpose of providing long-distance service (out-of-District), that are generally equipped with luggage compartments, restrooms, and overhead storage.

(2) Upon demonstration to the Executive Officer, any vehicles as required pursuant to paragraph (d) for which no alternative-fuel engine and chassis configuration is available commercially or could be used.

(3) An airport fleet operator who provides taxicab pickup services at commercial airport terminals may purchase a light- or medium-duty vehicle that is not certified by CARB as ULEV or cleaner if the SCAQMD or its designated agent has not provided sufficient funding to fully offset the purchase cost of an alternative-fueled vehicle that complies with paragraph (d)(4)



less $10,000 (paid by or on the behalf of the airport fleet operator):

(A) within 10 working days after notification by the airport fleet operator of the intent to purchase such vehicle and the airport fleet operator has provided documentation that the $10,000 is immediately available for purchase of the rule compliant vehicle, or

(B) within two working days after the airport fleet operator has notified the SCAQMD or its designated agent in the event that the taxicab vehicle to be replaced is rendered inoperable due to a roadside accident and would require immediate replacement of the taxicab vehicle. In addition, the airport fleet operator must demonstrate that the $10,000 to be provided by the airport fleet operator is immediately available for purchase of the rule compliant vehicle.

(C) Notwithstanding the provisions in paragraphs (e)(3)(A) or (e)(3)(B), the airport fleet operator shall be responsible to pay for the cost of converting the new rule compliant vehicle to meet applicable taxicab vehicle specifications and all other incidental costs including but not limited to, sales tax on the $10,000 provided by the airport fleet operator, license, and registration fees.

(D) An airport fleet operator qualifying for a non-rule compliant vehicle as provided in paragraphs (e)(3)(A) or (e)(3)(B) shall purchase the non-rule compliant vehicle within 10 working days after being notified that such vehicle could be purchased or reapply for co-funding pursuant to paragraphs (e)(3)(A) or (e)(3)(B).

(4) Vehicles not certified by CARB as ULEV or cleaner that are converted to be wheelchair accessible (to meet regulations set by the Commercial Airport Authority and all Americans with Disability Act of 1990 requirements, including door height overhead clearance as well as ramp or lift design specifications) for the purpose of providing taxicab pickup services at commercial airport terminals.

**(f) Compliance Auditing and Enforcement**

(1) The fleet operator shall provide at the request of the District any files and/or records created to comply with subdivision (d) including fleet-specific purchase information, such as a list of official DMV registrations, and manufacturer, model-year, model, engine family number, and fuel type of each fleet vehicle. The fleet operator shall keep all required records for a minimum of two years.

(2) Any fleet operator seeking an exemption under subdivision (f) shall supply proof that their fleet is exempted from this rule when requested by the District.

**(g) Severability**

If any provision of this rule is held by judicial order to be invalid, or invalid or inapplicable to any person or circumstance, such order shall not affect the validity of the remainder of this rule, or the validity or applicability of such provision to other persons or circumstances. In the event any of the exceptions to this rule is held by judicial order to be invalid, the persons or circumstances covered by the exception shall instead be required to comply with the remainder of this rule.

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South Coast Air Quality Management District

*(Adopted October 20, 2000)*

## RULE 1196. CLEAN ON-ROAD HEAVY-DUTY PUBLIC FLEET VEHICLES

**(a) Purpose**

For public fleets of heavy-duty vehicles operating in the South Coast Air Quality Management (District), this rule requires public fleet operators to acquire alternative-fuel heavy-duty vehicles when procuring or leasing these vehicles to reduce air toxic and criteria pollutant emissions.

**(b) Applicability**

This rule applies to all government agencies located in the District, including federal, state, regional, county and city government departments and agencies, and any special districts such as water, air, sanitation, transit and school districts, with 15 or more heavy-duty vehicles. This rule shall not apply to vehicles or services pursuant to paragraph (f) or vehicles subject to Rules 1192, 1193, [adopted June 16, 2000], 1194 [adopted August 18, 2000], 1195 [*proposal for school buses*] or 1186.1 [adopted August 18, 2000].

**(c) Definitions**

For purposes of this rule, the following definitions shall apply:

(1) ALTERNATIVE-FUEL HEAVY-DUTY ENGINE OR VEHICLE means a heavy-duty vehicle or engine that uses compressed or liquefied natural gas, propane, methanol, electricity, fuel cells, or other advanced technologies that do not rely

on diesel fuel, and has been certified by the California Air Resources Board (CARB).

(2) APPROVED CONTROL DEVICE(S) is a CARB-certified exhaust control device(s) that reduces particulate matter and possibly other precursor emissions. To be considered fitted with an approved control device(s), all diesel exhaust from the vehicle must be vented through such a device(s) that has been fitted at the time of vehicle purchase. The vehicle equipped with such a control device must use diesel fuel with a sulfur content no greater than 15 ppm.

(3) DUAL-FUEL HEAVY-DUTY VEHICLE means a heavy-duty vehicle equipped with a diesel engine that uses an alternative fuel (such as compressed or liquefied natural gas, liquefied petroleum gas, methanol, or other advanced technologies) in combination with diesel fuel to enable compression ignition. A dual-fuel engine typically uses the alternative fuel to supply 85 percent of the total engine fuel requirement on a BTU basis. A dual-fuel engine must be certified by CARB to meet an applicable optional nitrogen oxide exhaust emission standard and be fitted with a particulate matter aftertreatment control device that achieves a particulate matter emissions level no greater than the particulate matter emissions level of the latest certified M-100 methanol engine certified by CARB prior to the date of adoption of this rule.

(4) EMERGENCY OR RESCUE VEHICLE means any vehicle defined in Section 165 of the California Vehicle Code and is equipped with red lights and sirens as defined in Sections 30, 25269, and 27002 of the California Vehicle Code.



(5) FLEET VEHICLE means any heavy-duty on-road vehicle, owned or leased by a public fleet operator that totals 15 or more heavy-duty vehicles excluding vehicles exempt under paragraphs (f)(1) and (f)(2).

(6) HEAVY-DUTY VEHICLE means any vehicle having a gross vehicle weight of at least 14,000 pounds.

(7) PUBLIC FLEET OPERATOR is a person who owns, leases, or operates heavy-duty fleet vehicles in the District. A person is a federal, state, county or city government department or agency, or special district.

(8) SPECIAL DISTRICT means any public agency that provides public services such as, but not limited to, sanitation, school, transit, air, and water districts.

(9) VEHICLE means any self-propelled, motorized device that is permitted to operate on public roads through Department of Motor Vehicle registration or the federal government.

**(d) Fleet Requirements**

Beginning July 1, 2002, for public fleet operators with 15 or more heavy-duty vehicles, all new additions to an existing fleet, or formation of a new fleet, of heavy-duty vehicles shall be by purchase or lease of:

(1) alternative-fuel heavy-duty engine or vehicles;

(2) dual-fuel heavy-duty vehicles;

(3) dedicated gasoline heavy-duty vehicles; or

(4) If the fleet operator has an approved Technical Infeasibility Certification for this purchase or lease, as described in subdivision (e), a diesel-powered heavy-duty engine or vehicle with an approved control device and maintain that approved control device per manufacturer's specifications. The provisions of this section shall not apply to subparagraph (e)(1)(D) after June 30, 2004.

**(e) Technical Infeasibility Certification Criteria and Procedures**

(1) No less than 60 days prior to the date of purchase or lease of a replacement or additional heavy-duty engine or vehicle, any fleet operator seeking to comply with paragraph (d)(4) shall demonstrate the technical infeasibility of complying with paragraph (d)(1), d(2), or (d)(3) requirements by submitting a signed and dated Technical Infeasibility Certification Request to the Executive Officer and attest to the accuracy of all statements therein, that shall include:

(A) The name and address of the public fleet operator; and

(B) Current heavy-duty vehicle fleet composition, including make, model; and

(C) Demonstration that no engine and chassis/body configuration that meets the requirements of paragraphs (d)(1), (d)(2), or (d)(3) is commercially available from any manufacturer (only technical reasons for choosing a given chassis/body configuration are acceptable) or could be used in a specific application.



(D) Demonstration that an alternative-fuel refueling station for alternative-fueled or dual-fuel heavy-duty vehicles that are commercially available from any manufacturer is not available within five miles of the vehicle storage or maintenance yards, or at locations where vehicles will be home-based for extended periods of time and the refueling supply is provided through mobile means.

(E) Demonstration that vehicles complying with paragraphs (d)(1), (d)(2), or (d)(3) exceed the incremental cost-effectiveness criteria established in accordance with the most recent requirements of the Carl Moyer Program or the Mobile Source Emission Reduction Review Committee Program, whichever is greater.

(2) Within 45 calendar days of receipt of a completed Technical Infeasibility Certification Request submitted pursuant to paragraph (e)(1), the Executive Officer will either approve or disapprove the Request, in writing. The Executive Officer shall disapprove the request if it does not meet the requirements of paragraph (e)(1). If a Technical Infeasibility Certification Request is disapproved by the Executive Officer:

(A) The reasons for disapproval shall be given to the applicant in writing.

(B) Upon receipt of a notice of a disapproved Technical Infeasibility Certification Request, the fleet operator shall comply with paragraph (d)(1), (d)(2), or (d)(3).

(C) The fleet operator may resubmit a Technical Infeasibility Certification Request at any time after receiving a disapproval notification or may apply for a variance with the SCAQMD Hearing Board. (See SCAQMD Regulation V and California Health and Safety Code Sections 42350 through 42372 for information regarding variances.), but must still comply with paragraph (d)(1), (d)(2), or (d)(3) until such time as the Executive Officer approves a Technical Infeasibility Certification Request under paragraph (e)(1) or a variance is given by the SCAQMD Hearing Board.

(3) A Technical Infeasibility Certification Request is subject to a plan filing and evaluation fees as described in Rule 306.

**(f) Exemptions**

The provisions of this rule shall not apply to the following:

(1) Emergency or rescue vehicles operated by local, state, and federal law enforcement agencies, police and sheriffs department, fire department, hospital, medical or paramedic facility, and used for responding to situations where potential threats to life or property exist, including but not limited to fire, ambulance calls, or life-saving calls.

(2) Privately owned or operated heavy-duty vehicle fleets that provide contract services to a public agency. Nevertheless, privately owned or operated heavy-duty vehicle fleets may be required to meet other SCAQMD rules such as Rules 1192, 1193, 1194, or 1186.1.



(3) No more than ten evaluation/test vehicles per fleet, provided by or operated by vehicle manufacturer for testing or evaluation, exclusively.

(4) Any vehicle added to or replacing a vehicle in an existing fleet after the applicable implementation date of this rule, as specified in subdivision (d), as long as the purchase contract for acquisition of such vehicle is signed before the date of adoption of this rule. This exemption does not apply to the execution of options to acquire vehicles where the option is executed after the date of adoption of this rule and where vehicle delivery does not occur until after the applicable implementation date as specified in subdivision (d).

(5) Military vehicles used for tactical operations.

(6) Heavy-duty vehicles used routinely to transport materials in and out of the District.

(7) Heavy-duty vehicles operated and housed by state agencies or special districts in the Riverside County portion of the Mojave Desert Air Basin and located within the District if the vehicles are equipped with approved control devices.

(8) When the remainder of the fleet consists of heavy-duty vehicles that meet the requirements of paragraphs (d)(1) or (d)(2),

(a) For public fleets with greater than 15 but less than 100 heavy-duty vehicles, no more than three (3) heavy-duty vehicles that do not meet the requirements of Subdivision (d) of this rule may be part of the fleet at any given

time. Such vehicles shall be equipped with approved control devices.

(b) For public fleets with 100 or more heavy-duty vehicles, no more than three (3) heavy-duty vehicles that do not meet the requirements of Subdivision (d) of this rule may be part of the fleet and are garaged, housed, parked, stored at any single vehicle storage or maintenance yard at any given time. Such vehicles shall be equipped with approved control devices. A public fleet operator may deploy these vehicles and place them at any one vehicle storage or maintenance yard if the public fleet operator submits a plan to the SCAQMD demonstrating that a proportionate number of such heavy-duty vehicles is reduced at other facilities operated by the public fleet operator.

(9) Heavy-duty vehicles leased for no more than 120 days in any 12-month period by the U.S. Postal Service during the peak winter holiday period.

(10) Heavy-duty vehicles owned or operated by federal agencies, state agencies, county agencies, or special districts whose jurisdiction include areas outside of the District and the heavy-duty vehicles are garaged, housed, parked, stored or operated within the District for no more than 180 days in any 12-month period.

**(g) Compliance Auditing and Enforcement**

(1) The fleet operator shall provide at the request of the District any files and/or records created to comply with subdivision (d) including



fleet-specific information, such as a list of official DMV registrations, principal vehicle location, and manufacturer, model-year, model, and fuel type and usage, of each fleet vehicle. This provision shall not apply for records that have been in existence for more than one year.

(2) Any fleet operator seeking an exemption under subdivision (f) shall supply proof that their vehicle or fleet is exempted from this rule when requested by the District.

**(h) Severability**

If any provision of this rule is held by judicial order to be invalid, or invalid or inapplicable to any person or circumstance, such order shall not affect the validity of the remainder of this rule, or the validity or applicability of such provision to other persons or circumstances. In the event any of the exceptions to this rule is held by judicial order to be invalid, the persons or circumstances covered by the exception shall instead be required to comply with the remainder of this rule.

**SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT**

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**Staff Report**

**Proposed Rule 1191 – Clean On-Road Light- and Medium-Duty Public Fleet Vehicles**

**June 2000**

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## ATTACHMENTS

1. PROPOSED RULE LANGUAGE
2. VEHICLE POPULATION DATA
3. ARB-CERTIFIED ENGINES/VEHICLES QUALIFYING UNDER RULE 1191(e)
4. ARB-CERTIFIED ENGINES/VEHICLES NOT QUALIFYING UNDER RULE 1191(e)
5. ARB LEV REGULATIONS: EXHAUST MASS EMISSION STANDARDS

## INTRODUCTION

The South Coast Air Quality Management District (AQMD) is proposing a rule that would require the public sector fleet operations that have 15 or more light- and medium-duty vehicles to acquire lower-emitting gasoline or alternative fuel vehicles (AFVs) when procuring or leasing these vehicles in the AQMD. In addition, any new public fleets will be required to purchase lower-emitting gasoline or alternative-fueled light- and medium-duty vehicles. Examples of fleets affected by this proposal include those operated by federal, state, county, and city

agencies, as well as airports, and special districts – such as air, water, transit and school districts. Emergency vehicles are specifically exempted from this requirement, unless the AQMD Governing Board determines that sufficient refueling stations are available to the extent that their emergency response capabilities are not impaired. For the purposes of this proposed rule, emergency and rescue vehicle fleets will be exempt from rule compliance.

This proposal is based on Health and Safety Code Section 40919, which allows certain nonattainment air districts (those that are designated serious or above for ozone) to adopt measures requiring fleets to use a significant number of low-emission vehicles. A "low-emission vehicle" (LEV) is defined in Health and Safety Code Section 39037.05. This regulatory authority is being implemented in the proposed rule in a two-phase approach. In the initial first years of rule implementation, affected public fleets will be required to purchase gasoline or alternative fuel vehicles that are certified by the California Air Resources Board (ARB) as low-emission vehicles or cleaner. This LEV standard currently is approximately the same as a hydrocarbon standard twice as stringent as otherwise allowed, as specified in Section 39037.05. This requirement will become more stringent after several years of rule implementation by requiring affected fleets to purchase ultra-low-emission vehicles (ULEVs) or cleaner when a majority of vehicles sold by manufacturers are ARB certified to these vehicle categories. At that time, ULEVs will equate to approximately twice as stringent as the applicable hydrocarbon standard as defined under Section 39037.05. In addition, Section 40447.5 specifically authorizes the AQMD to regulate fleets.



Despite the significant progress that has been made in reducing both mobile and stationary emissions over the past twenty years, the South Coast Air Basin (Basin), which includes Los Angeles, San Bernardino, Riverside, and Orange Counties, continues to experience extremely serious air quality problems, dominated by motor vehicle pollution. The Basin is still the only area in the country classified by U.S.EPA as an extreme nonattainment area. Based on the latest information available, on-road motor vehicles contribute more than half of all hydrocarbons, oxides of nitrogen, and carbon monoxide to the entire emissions inventory. In addition, on-road motor vehicle pollution, specifically from two significant gasoline hydrocarbon compounds – benzene and 1,3 butadiene and exhaust emissions from diesel vehicles, has been identified as the principal source of public exposure to air toxics, based on recent work conducted by the AQMD and other agencies.

This proposed rule is being developed in an effort to reduce public exposure to motor vehicle pollution, including both toxic and ozone precursor emissions. It is intended that these benefits be surplus to existing state and federal regulations governing emission levels from on-road motor vehicles.

Public fleets have been identified in the proposed rule because government agencies have an opportunity to take a leadership position in utilizing the cleanest vehicle technologies. Many government fleets, for example, have implemented policies that promote the purchase of clean low-emission or alternative-fuel vehicles in an effort to improve air quality in their area of jurisdiction. As a result of these policies, these fleets have significant experience demonstrating the feasibility of these vehicles in normal

fleet operations. In addition, many of these fleets emit air emissions, including air toxics, into highly urbanized pedestrian breathing zones and neighborhoods adjacent or in close proximity to airports. Public fleets also make up a significant share of fleet vehicles in the region.

Proposed Rule 1191 is one of a series of rules being proposed that affect vehicle fleet operations in the AQMD. The AQMDs' objective is to promote the use of clean vehicle technologies to as many vehicle fleets as possible, not just those under consideration in Proposed Rule 1191, to maximize the air quality benefits of clean vehicle technologies. Depending on the effectiveness in the implementation of Proposed Rule 1191 and the other fleets rules under consideration, the AQMD intends to expand the scope of these rules, as feasible, to maximize the air pollution benefits of clean vehicle operation within the AQMD's four-county jurisdiction.

## BACKGROUND

Two important efforts to evaluate and identify air toxics include the AQMD's Multiple Air Toxics Exposure Study II (MATES II) and the California Air Resources Board's (ARB) identification of particulate matter from diesel engine exhaust as a surrogate for all diesel exhaust emissions including hydrocarbons as toxic air contaminant (TAC). The development of this proposed fleet rule is in large measure being driven by the results of these two very important research and regulatory efforts. The development of the fleet rule is also affected by recent state and federal rulemaking efforts and actions that are intended to, or have resulted in, lowering on-road mobile source emissions by reducing tailpipe emissions and/or



requiring the sale or purchase of alternative fuel vehicles. Some of these more important rulemaking activities, as well as their significance to the proposed fleet rule, will be described, including the ARB's Low-Emission Vehicle (LEV) Program and the U.S. Energy Policy Act (EPAct) requirements.

## MATES II

In November 1999 the AQMD issued a draft final report for the MATES II study. The objectives of this study were to monitor and evaluate urban air toxics, as well as update the toxics emission inventories for the Basin and conduct air toxic dispersion modeling to simulate the monitored data. During the course of the study, the ARB listed diesel particulate emissions as an air toxic contaminant. As such, the study provided an analysis of the potential air toxic impacts of diesel emissions. The study represented one of the most comprehensive air toxics programs ever conducted in an urban environment. The scope of the study included the monitoring of more than 30 toxic air pollutants at 24 sites over a one-year period ending last spring. The AQMD collected more than 4,500 air samples and together with the ARB performed more than 45,000 separate laboratory analyses of these samples.

The findings of this study indicated that the cancer risk from some air toxics in the Basin has declined by as much as 75 percent over the last decade. However, it also showed that based upon more extensive monitoring of the variety of toxic compounds in the air, the current cancer risk from toxic air pollution averages about 1,400 in a million in the region. As shown in Figure 1, the study found that 71 percent of this cancer risk is attributable to diesel

particulate. Other important toxic species contributing significantly to this cancer risk, originating from both gasoline- and diesel-powered mobile sources as well as stationary sources, are 1,3 butadiene (8 percent of risk), benzene (7 percent of risk), and carbonyls which include formaldehyde and acetaldehyde (3 percent of risk). One of the primary objectives of proposed Rule 1191, based on the findings of this study, is to reduce the contribution of overall toxic risk of diesel exhaust emitted by public fleets and the gaseous air toxic compounds associated with gasoline vehicles in the region, by accelerating the implementation of currently available low-emission vehicle technology.



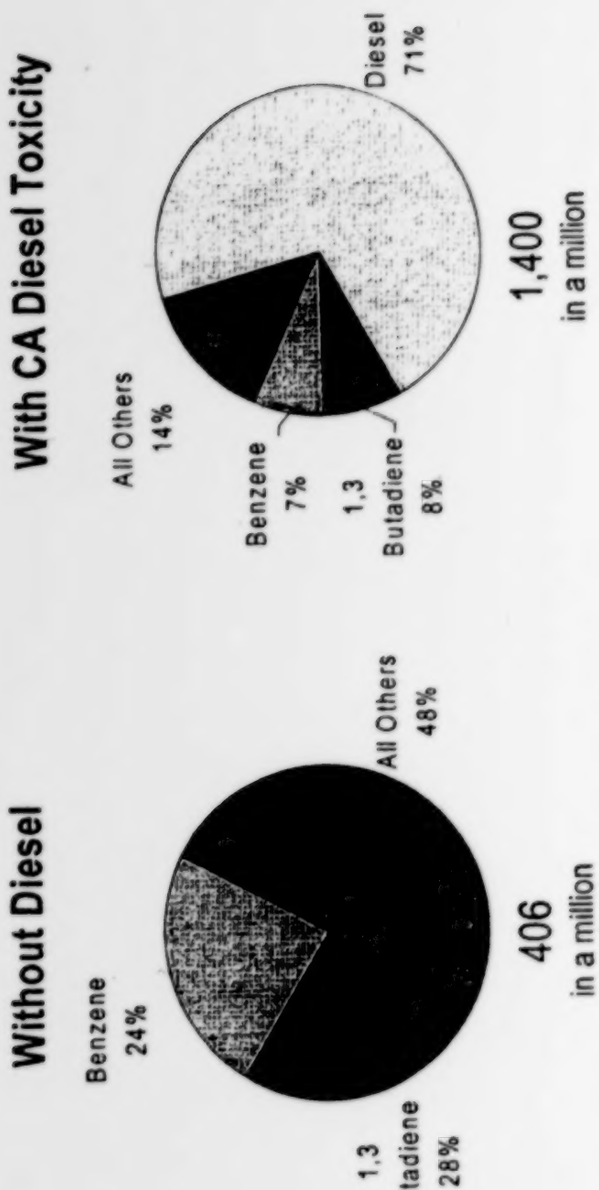


**Figure 1**

Estimated Average South Coast Air Basin Toxic Risk
Contributions based on findings from the MATES-II Study

## ARB Identification of Diesel Emissions as a Toxic Air Contaminant

In the early 1980's, the ARB established one of the nation's first comprehensive state air toxic programs – the California Air Toxics Program. Its goal is to protect public health by reducing air toxic emissions that pose the highest risk to Californians. This requires two separate steps. During the first step, risk assessment, the ARB identifies the highest risk substances called toxic air contaminants. In the second step or risk management step, the ARB and local air pollution control districts investigate and adopt measures requiring air toxics sources to minimize risk to public health.

There are approximately 200 substances on the TAC list. On August 27, 1998, the TAC was expanded to include particulate emissions from diesel-fueled engines, culminating a near-decade long scientific investigation into the health effects of exposure to the fine particles and other pollutants in diesel exhaust. Similar to the findings of the MATES II study, the ARB identification of diesel exhaust particulate matter as a surrogate for all diesel exhaust emissions, as a TAC provides another driving force for the AQMD to pursue the development of a cleaner vehicle fleet rule as a strategy to mitigate public exposure to this pollutant.

## ARB's Low-Emission Vehicle Program

In adopting the LEV regulations in 1990-91, the ARB established the most stringent exhaust regulations ever for light- and medium-duty vehicles. The regulations include three primary elements – (1) tiers of exhaust emission standards for increasingly more stringent



categories of low-emission vehicles, (2) a mechanism requiring each manufacturer to phase in a progressively cleaner mix of vehicles from year to year, and (3) a requirement that a specified percentage of passenger cars and lighter light-duty trucks be zero-emission vehicles (ZEVs).

Since the beginning of ARB's LEV rule implementation in 1994, light- and medium-duty vehicle original equipment manufacturers (OEM) have produced an array of vehicle models with varying types of control technologies that reduce vehicle emissions in varying degrees. The dominant emission control strategy has been the development of sophisticated engine control systems (computerized control of the vehicle fuel system) in combination with extremely efficient aftertreatment hardware (advanced catalytic converters) as applied towards gasoline vehicles. In addition, these control technologies have also been employed on a number of commercially available alternative fuel vehicles powered by natural gas, M85 (a mixture of 85 percent methanol and 15 percent gasoline), and liquefied petroleum gas. As mentioned above, OEMs have been required, and in some cases have voluntarily chosen, to produce for sale limited numbers of dedicated electric vehicles and hybrid electric vehicles. One of the objectives of the proposed rule is to require the purchase of the cleanest vehicles for fleets, taking advantage of the varying levels of emission control relative to the wide array of vehicles being produced for compliance with the LEV regulation. It is noteworthy that, other than zero-emission vehicles, the cleanest internal combustion engine light-duty vehicle commercially available today is the year 2000 model year Honda Civic, powered by compressed natural gas. This vehicle is 90 percent cleaner than the average

new 2000 model year vehicle, and it is certified as a super-ultra-low-emission vehicle (SULEV), according to ARB's LEV regulations.

Attachment 5 tabulates exhaust standards for non-methane organic gases (NMOG), carbon monoxide (CO), and oxides of nitrogen NOx emission standards specified in the ARB LEV Regulations, where LEV-I applies to model years 1998 through 2003 and LEV-II applies to subsequent model years, beginning with 2004. These emission standards apply to the vehicle manufacturers. The emission standards illustrate the relative magnitude of exhaust emissions for the various categories of low-emission vehicles, and form the basis for emission reductions that are expected on a per-vehicle basis as a result of PR1191.

**U.S Energy Policy Act Requirements**

The U.S. Energy Policy Act (EPAct) is administered by the U.S. Department of Energy (DOE) and is designed to reduce dependence on foreign oil supplies and increase the use of alternative fuel vehicles. By passing this legislation, Congress recognized that fleets are uniquely suited for introducing new fuel and vehicle technologies. According to U.S. DOE, fleet vehicles typically accumulate higher mileage than private vehicles and are replaced more frequently. Basically, beginning in 1997, federal, state, and alternative-fuel-provider fleet operators must acquire new alternative fuel vehicles as a percentage of new vehicle acquisitions. This percentage starts out at 10 to 33 percent depending on fleet type, and gradually increases over time. By the year 2002, EPAct alternative fuel vehicle purchase requirement is 75 percent for federal and state



fleets, and 90 percent for fuel provider fleets. Municipal and private fleet operator participation in EPAct is currently in question; U.S. DOE is due to rule on this issue by April 2000. If these fleets are ultimately included in EPAct, alternative fuel vehicle purchase requirements for these fleet operators will probably begin in 2002.

Basically, EPAct requirements are limited to fleets with 50 or more light- and medium-duty vehicles (up to 8,500 lb. GVWR), operating at least 20 of these vehicles in cities that had a population of at least 250,000 at the time of the 1980 U.S. census. In general, urbanized areas with the AQMD meet this criterion and are therefore subject to EPAct requirements. Examples of alternative fuels that can be used to power fleet vehicles under EPAct include methanol, ethanol, natural gas, liquefied petroleum gas, hydrogen, and electricity.

EPAct set a regulatory precedent by requiring large-scale purchases of alternative fuel vehicles by government and certain private fleets. The regulations have been in place since 1992, and thus EPAct-affected fleets, which constitute a significant proportion of vehicle fleets within the scope of the AQMD's proposed fleet rule, have been preparing for and have been gaining significant experience in the operation of light- and medium-duty alternative fuel vehicles. In essence, the AQMD's proposed fleet rule builds upon federally mandated alternative fuel fleet requirements that have been in place for nearly a decade.

Since EPAct requires certain public fleets and some private fleets to purchase alternative fuel vehicles, Proposed Rule 1191 has different requirements on public fleets that will allow purchases of cleaner gasoline powered vehicles or alternative fuel vehicles and would not be

considered duplicative within the meaning of Health and Safety Code Section 40727.2

## GENERAL DESCRIPTION AND EXPLANATION OF RULE REQUIREMENTS

### Applicability

The rule applies to public fleets operating in the AQMD with 15 or more on-road light- and medium-duty vehicles. These fleets include all government/public fleets operating within the boundaries of the AQMD. Examples of these fleets include those operated by federal, state, county, city, special district, regional agency, airports, and joint-power authorities.

Many government entities have begun converting to alternative fuels or to other clean vehicles in their fleets, both as a result of mandates and as a result of incentives programs. Cities and counties in the South Coast are granted AB2766 subvention funds specifically to reduce motor vehicle air pollution. Government fleets are thus well-suited for early implementation of clean vehicle requirements. It is also important for governments to play a leadership role in reducing air pollution from motor vehicles. Precedent for such an approach is in the Energy Policy Act. Public sector fleets account for about 25 percent of the total fleet population. They also tend to be in more urbanized areas where the benefits of reducing emissions will be the greatest.

### Vehicle Purchase Requirements

The primary air quality objective of Proposed Rule 1191 is to reduce air emissions and toxic risk levels within the



AQMD. For light- and medium-duty gasoline vehicles, VOCs including benzene and 1,3-butadiene are the primary hydrocarbon compounds that have significant contributions to the overall toxic risk level. For medium-duty vehicles operating on diesel engines, particulate emissions primarily contribute to overall toxic risk levels.

The rule requires the purchase of clean low-emission vehicles by public agencies operating 15 or more light- and medium-duty vehicles. Under California Health and Safety Code Section 40919, certain nonattainment air districts (those that are designated serious or worse for ozone) may adopt measures requiring fleets to use a significant number of low-emission vehicles. California Health and Safety Code Section 39037.05 defines a low emission vehicle as "a motor vehicle which has been certified by the state board [ARB] to meet all applicable emission standards and which meets at least one of the following additional requirements:

(a) Is capable of operating on methanol, as determined by the state board, and will have an adverse impact on ambient ozone air quality not greater than a vehicle which meets the requirements of subdivision (c).

(b) Is capable of operating on any available fuel other than gasoline or diesel and, in the determination of the state board, will have an adverse impact on ambient ozone air quality not greater than a vehicle operating on methanol.

(c) Operates exclusively on gasoline and is certified to meet a hydrocarbon exhaust emission standard which is at least twice as stringent as otherwise applicable to gasoline vehicles of the same year and class."

Given the specific criteria set forth in Health and Safety Code Section 39037.05, diesel-fueled vehicles would not be considered "low-emission vehicles." It is proposed that compliant light- and medium-duty vehicles be powered by any fuel-type engine that meets the definition of LEV as provided in Section 39037.05. A qualifying purchase may be a new vehicle or a used vehicle that meets these requirements. For vehicles that are exclusively gasoline-powered, the vehicle must meet the requirements of Section 39037.05(c).

To meet the requirements of Section 39037.05, staff is proposing that beginning July 1, 2001, public fleets be required to purchase only vehicles meeting ARB certification of low-emission vehicles or cleaner during the initial first years of rule implementation. As mentioned previously, ARB will require vehicle manufacturers to sell vehicles meeting various tiers of exhaust emission standards for hydrocarbon, carbon monoxide, and oxides of nitrogen. In order of increasing stringency, ARB vehicle emission categories include: Tier 1, transitional low-emission, low-emission, ultra-low emission, super-ultra-low-emission, and zero-emission vehicles. Over time, the ARB low-emission vehicle regulation will require the mix of vehicles sold by manufacturers to become cleaner as a result of compliance with fleet average hydrocarbon standards. By requiring the acquisition of ARB-certified low-emission vehicles or cleaner when public fleets add or replace vehicles, the purchase of higher polluting Tier 1 and transitional-low-emission vehicles will be prevented. Taking into account the emission standards for each individual vehicle emission category as well as the fleet average hydrocarbon level, staff believes that by restricting fleet acquisitions to ARB certified low-emission



vehicles or cleaner, AQMD is implementing Section 39037.05(c) of the Health and Safety Code. Relative to vehicle purchases, any passenger car or light-duty vehicle certified as an LEV or better may be purchased. The low-emission vehicle standard has been in place since 1998.

After the initial first years of rule implementation, as noted previously, public fleet acquisitions of light- and medium-duty vehicles will be restricted to vehicles meeting ARB certifications of ultra-low-emission vehicles or cleaner. This will be triggered when at least 50 percent of the vehicle sales of light- and medium-duty vehicles, determined separately for each of these categories, are ARB certified as ultra-low-emission vehicle or cleaner. This is projected to occur around 2004, using ARB vehicle sales projections. Staff believes that this requirement is also consistent with Section 39037.05(c) of the Health and Safety Code since the highest emission standards (namely Tier 1 and transitional low-emission vehicle or TLEV) will no longer be allowed under the ARB LEV program.

In order to implement these fleet acquisition requirements, the AQMD will publish a list of vehicle/engine models that meet ARB certifications of low-emission vehicle and cleaner, or ultra-low-emission vehicle or cleaner. It is intended that fleet managers will simply choose vehicles from this list for rule compliance purposes when vehicles need to be acquired for their vehicle fleet. Since manufacturers certify their vehicles with ARB throughout the year, the list of compliant vehicles will be updated every six months. Attachment 3 lists model year 2000 vehicles that would qualify for the proposed rule, if it were in effect today. In addition, ARB-certified vehicles not on the list would also qualify.

## MODEL AVAILABILITY

AQMD staff believes that, based on ARB projections of the numbers of low-emission vehicles that will be available now and in the future as well as the proposed July 1 2001 implementation date of the rule, there should generally be sufficient model availability for compliance with rule requirements in the light- and medium-duty vehicle categories. The July 1, 2001 implementation date was specifically chosen to be consistent with the fiscal year budgeting process of most government agencies. For certain types of specialty medium-duty vehicles (engine-certified), ARB's LEV regulation may not require manufacturers to sell sufficient amounts of vehicles or models prior to this date to satisfy fleet operational needs and still comply with PR1191 purchase requirements. However, beginning with model year 2002, ARB's LEV regulation specifies that manufacturers must sell 100 percent of their engines to meet the LEV emission level. With the July 1, 2001 implementation date, procurement of engine certified specialty vehicles in the medium-duty category will not be a significant issue, since manufacturers will be offering model year 2002 compliant engines beginning in the later part of 2001.

Notwithstanding the above discussion, there still may be a model availability issue since fleet operators are indicating that there are potentially many specialty diesel-powered medium-duty vehicles where the availability of corresponding gasoline or alternative fuel vehicles is uncertain. (Note that PR1191 only allows compliant gasoline and alternative-fueled vehicles to be purchased.) To address this issue, non-compliant vehicle purchases will be allowed if vehicle fleets have sufficient prior purchases (before Proposed Rule 1191 implementation) of alternative-fueled



ultra-low-emission vehicles or cleaner, or the fleet operator purchases sufficient numbers of alternative-fueled super-ultra-low-emission vehicles or cleaner, according to a specific formula. This provision also serves the dual purpose of recognizing fleets that have taken a leadership role by purchasing clean vehicles prior to Proposed Rule 1191 implementation. Despite the alternative fuel purchase crediting mechanism, some public fleets may not be able to use an alternative fuel light-duty vehicle so that a non-compliant medium-duty vehicle could be purchased. As such, PR 1191 will allow for a purchase of non-compliant medium-duty vehicle if there is a demonstration of such a need.

A comment was made that some entities purchase used vehicles and convert these vehicles to operate on alternative fuels with CARB certified conversion kits. In recognition of such activities, PR 1191 would allow for such purchases if the conversion was to meet the "low-emission vehicle" standard or cleaner. At the time that ULEV purchases would be required, conversion kits used on used vehicles shall meet ULEV emission standards.

### Exemptions

With regard to vehicle acquisitions that are exempted from rule requirements, the proposed rule contains language that is intended to allow fleets to continue purchasing current gasoline or diesel powered vehicles for emergency vehicle applications. Emergency vehicles are basically vehicles used in situations where threats to life or property exist. At this time, staff is proposing to exempt the types of emergency vehicles as defined in Vehicle Code Section 165 that are equipped with at least one steady

burning red warning lamp as permitted by Vehicle Code Sections 25269 and 27002 to be considered emergency vehicles for PR1191 exemption purposes. In addition, the AQMD would consider undercover and police surveillance vehicles to qualify as emergency vehicles; however, vehicles used for the primary purpose of enforcing parking ordinances or used for personnel transportation would be subject to the proposed rule.

Additional categories of vehicles exempted from the proposed rule include heavy-duty vehicles, manufacturer evaluation/test vehicles, and vehicles acquired as a result of signed contract agreements as of the date of adoption of the proposed rule. PR1191 is also not intended to be applicable to private vehicle fleets that are operating on behalf of a public agency in providing contract services to the public agency. Examples of these companies that may use their own fleet vehicles to provide the contracted service(s) to the public agency include landscape service companies and office supply companies.

## SUMMARY OF DATA COLLECTION/ANALYSIS OF FLEET CHARACTERISTICS

Attachment 2 summarizes vehicle population data of public fleets potentially affected by the proposed rule. These data include information solicited from hundreds of affected fleets operating within the AQMD involving a variety of applications. These fleets include special district (e.g., utility) and municipal fleets, with functions regarding water supply/runoff, electric power supply, public works, and other city maintenance departments. There are also many state and federal fleets, including local postal



delivery and Caltrans fleets. In addition, airports operate their own fleets for a variety of functions.

The data have been compiled using various sources of information, including direct surveying of public fleets, existing reports which include information on fleet vehicle population characteristics, associations/organizations that represent public fleets, and public agencies including the California Department of Motor Vehicles, California Energy Commission, ARB, U.S. EPA Region IX, and the U.S. Department of Energy.

## COST ANALYSIS

### Fleet Cost Impacts

The cost impacts of the proposed rule are expected to be minimal since the cleaner gasoline vehicles are promoted by the rule. Staff has evaluated the cost of wide variety of current vehicle models that are ARB certified to the low-emission vehicle level or cleaner and has determined that this cost range basically coincides with current vehicle costs. In addition, proposed rule provisions as previously discussed to address model unavailability of compliant vehicles for specialty diesel-powered medium-duty vehicle applications will also minimize cost impacts associated with rule implementation. Staff is working on a funding mechanism document, which will be available separately, and it will provide additional information on funding sources and needs.

### Incremental Cost Analysis

Health and Safety Code Section 40920.6 requires an assessment of incremental cost effectiveness for proposed

regulations relative to ozone, CO, SOx, NOx, and their precursors. Incremental cost effectiveness is defined as the difference in control costs divided by the difference in emission reductions between two potential control options that can achieve the same emission reduction goal of a regulation. Compared to Proposed Rule 1191, incremental cost effectiveness of requiring alternative fuel vehicles for the first three compliance years is $133,900 per ton of combined pollutants (VOC, NOx, and one-seventh of CO) assuming no funding. An approximate 85 CNG refueling stations would be required for the alternative fuel light- and medium-duty vehicles (19,812 and 6,246, respectively).

## Funding Programs

For those public fleets that pursue the acquisition of AFVs, financing is a central issue in any effort to acquire and use these vehicles. There are a wide variety of incentives offered to encourage the expanded use of AFVs. Federal, state, and local monies/incentives are available that could potentially be used to offset costs incurred by rule compliance. Generally, incentives are available to fund differential (premium) capital costs, as well as subsidizing the capital cost of AFV refueling equipment or facilities, which would lead to significantly lower fuel cost. It should also be noted that CNG or LPG refueling equipment can potentially be installed at no capital cost by means of a long-term contract arranged between the fleet and the alternative-fuel provider. Private funds and in-kind services may also be available that would result in lower overall fuel costs.



A list of funding sources, including identification of public or private sources, purpose of funds, limitations, contact person, and relevant Internet sites follows. It is a compiled from Internet Web sites and published material based on staff research and input received from personal contacts from relevant sources in government and private organizations. The purpose in providing the information is to facilitate use of the funds for Proposed Rule 1191 compliance.

## Federal Incentives and Regulations

**U.S. Department of Energy (DOE)** 1000 Independence Avenue, SW, Washington, DC 20585. General telephone number: (202) 586-5000, fax (202) 586-5049.

*Energy Policy Act of 1992 (EPAct).* Congress passed EPAct, or Public Law 102-486, on October 24, 1992, to accelerate the use of alternative fuels in the transportation sector. With EPAct in place, DOE's primary goals are to decrease the nation's dependence on foreign oil and increase energy security through the use of domestically produced alternative fuels. DOE's overall mission is to replace 10% of petroleum-based motor fuels by the year 2000 and 30% by the year 2010. EPAct mandates **federal, state, and alternative fuel provider fleets** to purchase AFVs.

Federal fleets must follow guidelines established in Executive Order 12844 (April 21, 1993) and subsequently reinforced by Executive Order 13031 (December 13, 1996). An AFV guide for federal fleets is located at http://www.whitehouse.gov/WH/EOP/OMB/html/mheda/afvguide.html. State and fuel provider fleets must meet the

requirements outlined in the Alternative Fuel Transportation Program, Final Rule [10CFR Part 490], located at the Web site: http://www.afdc.doe.gov/ottdocs/fprovrule.pdf.

*Clean Cities Program.* DOE's Clean Cities Program coordinates voluntary efforts between locally based government and industry to **accelerate the use of alternative fuels and expand AFV refueling infrastructure**. For more information, please see the Clean Cities Section of this guide on pages 1-13.

*State and Alternative Fuel Provider Fleets AFV Credits Program.* Congress created the credits program to encourage fleets or covered fleet operators to use AFVs early and aggressively. Credits are allocated to state fleet operators and covered Alternative Fuel Provider fleet operators when AFVs are acquired over and above the amount required, or earlier than expected. Since credits can be traded and sold, fleets have the flexibility to acquire AFVs on the most cost-effective schedule without impeding the achievement of EPAct national oil displacement goals. Please see the AFV Acquisition and Credits Web site for more information on the credits program at www.ott.doe.gov/credits, or call the National Alternative Fuels Hotline at (800) 423-1DOE or (800) 423-1363 or email at hotline@afdc.nrel.gov.

*ANOPR.* DOE published an advance notice of proposed rulemaking (ANOPR) for **AFV acquisition requirements for private and local government fleets** on Friday, April 17, 1998. Programs potentially created by the ANOPR would help ensure that DOE meets its energy replacement goals. Public feedback will be incorporated into the rulemaking, which was scheduled to be finalized by April 1, 2000. A copy of the ANOPR is available on the



*Federal Register Web site* at http://www.access.gpo.gov/su_docs/aces/aces140.html or directly from the Web site at http://www.ott.doe.gov/pdfs/anopr.pdf.

*State Energy Program.* States will promote the conservation of energy, reduce the rate of growth of energy demand, and reduce dependence on imported oil through the development and implementation of a comprehensive State Energy Program. The State Energy Program is the result of the consolidation of two formula grant programs – the State Energy Conservation Program and the Institutional Conservation Program. The State Energy Program includes provisions for competitively awarded financial assistance for a number of state-oriented special project activities, including alternative fuels. In addition to funding for special project activities, states may choose to allocate base formula funds to program activities to increase transportation efficiency, including programs to accelerate the use of alternative transportation fuels for government vehicles. For more information, contact your State Energy Office or the DOE Regional Office for your region, listed under the Points of Contact section for your state, or contact Ron Santoro at DOE Headquarters at (202) 586-8296.

## AQMD Incentives

### Motor Vehicle Registration Fees (AB 2766 funding)

*Mobile Source Air Pollution Reduction Review Committee's (MSRC) Discretionary Funds.* This annual work program, that typically includes an HDV incentive program, pays the incremental cost for the purchase of new OEM alternative-fuel engines and vehicles. For LDVs the incentives for dedicated alternative-fuel OEM vehicles are based on

emissions certification: $5,000 for ZEVs, $3,000 for ULEVs, $1,000 for LEVs. Contracts are with OEMs; consumer price includes incentive. The current program sunsets January 1, 2001.

Thirty percent of the funds collected each year from a $4 surcharge on vehicle registration created by **AB 2766** (Sher) goes to the Mobile Source Air Pollution Reduction Review Committee **(MSRC)** to be used to implement programs to reduce mobile source emissions. Managers of the program have apportioned the available funding into several technology-specific categories, including: heavy-duty vehicles; zero-emission/ultra-low emission vehicles; research, development and demonstration of advanced low-emission transportation technologies; transportation control measures; and intelligent transportation systems.

The AQMD contact is Ray Gorski (MSRC Technical Advisor) at 909-396-2479.

*Local Government Subvention Funds*

Forty percent of the **AB 2766** funds collected go to cities and counties based on a pro-rated share of population and must be used to reduce mobile source emissions. This totals about $18 million per year. Cities can use their funds to purchase alternative-fuel vehicles or engines. While these funds are used primarily by municipalities for their own projects, these monies can be allocated by the city for public-private partnerships to pursue AFV and EV projects. Funds not expended carry over from year to year. The AQMD staff contacts are Larry Rhinehart (AQMD) at 909-396-3780 and Oscar Abarca (AQMD) at 909-396-3242.



**Utilities/Private Incentives**

Ford Motor Company is offering a $2,000 incentive on its dedicated F-Series NGVs and dedicated and bi-fuel Econoline NGVs. Incentives for the Crown Victoria NGV range from $1,500 to $2,025 depending on the purchase of Ford's Extended Range Package. Other incentives include $1,500 for the bi-fuel propane F-Series pickup and bi-fuel propane Econoline Van, and $1,000 for the Taurus Flexible Fuel Vehicle (FFV). For more information on pricing and incentives for fleets, contact Ford at 877-ALT-FUEL or at http://www.fleet.ford.com.

## EMISSION BENEFITS

The goal of the proposed fleet rule is to generate emission benefits beyond or surplus to existing and proposed on-road mobile source rules from ARB and U.S. EPA. These emission benefits are expected to consist of reduced toxic exposure to certain types of chemical species, including but not limited to diesel particulate matter, 1,3 butadiene, benzene, and carbonyls (formaldehyde and acetaldehyde). Emission benefits may also include reduced generation of criteria pollutants including hydrocarbon, carbon monoxide, and oxides of nitrogen. Since the release of the preliminary draft report, AQMD staff received more detailed information on the vehicle population for many public fleets. This information indicated that the original public fleet vehicle population estimate was somewhat higher than actual. Thus, the current emission benefits estimated are somewhat lower than those estimated in the preliminary draft report. The emission benefits are estimated for the year 2010 to be as follows:

| 2010 EMISSION BENEFITS (t/yr) | | |
|---|---|---|
| **Hydrocarbons** | **Carbon Monoxide** | **Oxides of Nitrogen** |
| 6.2 | 252 | 1.45 |

The proposed fleet rule is specifically based on achieving emission reductions beyond the ARB Low Emission Vehicle regulation. For light- and medium-duty vehicles, ARB Low Emission Vehicle (LEV I/II) regulations basically require manufacturers to sell vehicles certified to various emission-based categories, with a specific set of NMOG (basically hydrocarbon), carbon monoxide (CO), and oxides of nitrogen (NOx) emission standards assigned to each category. These categories, in descending order of emissions, are Tier 1, transitional low-emission, low-emission (LEV), ultra-low-emission (ULEV), super-ultra-low-emission (SULEV), and zero-emission vehicles (ZEV). The ARB LEV I/II regulations achieve emission reductions by requiring manufacturers to sell progressively cleaner mixes of vehicles over time.

For passenger cars and light-duty trucks, manufacturers sell a specific mix of vehicles certified to the various categories of low-emission vehicles to ensure compliance with a fleet-average NMOG emission level. Emission reductions are achieved over time by the gradual reduction of this fleet average NMOG standard. The fleet-average NMOG emission level for passenger cars, for example, is specified at 0.07 g/mi for the 2001 model year. This level is reduced annually, lowering to 0.035 g/mi for the 2010 model year. In the medium-duty vehicle category, the ARB LEV regulation achieves emission reductions by requiring



all vehicles to be certified to more stringent emission categories in specified model years (i.e., LEV in 2002 and ULEV in 2004). Notwithstanding the requirement schedule, medium-duty vehicle manufacturers also have the flexibility, similar to that of light-duty vehicles, to balance the sale of higher emitting vehicle models (e.g., vehicles certified to Tier-1) with vehicles certified to more stringent emission standards (e.g., vehicles certified to ULEV).

Emission reductions of the proposed fleet rule will be the result of affected vehicle fleets purchasing a cleaner mix of vehicles than they would have otherwise purchased. Specifically, fleets are required to purchase vehicles certified to the LEV category or cleaner. Using ARB manufacturer sales projections and staff projections of low-emission vehicles to be purchased by fleets as a result of the proposed fleet rule, corresponding fleet average emission rates by pollutant can be calculated and combined with vehicle population data to estimate overall emission benefits. It should be noted that at some point in the future, which is assumed to be 2004 for emission benefit quantification purposes, the proposed rule would restrict vehicle fleet purchases to ULEV or cleaner. This more stringent requirement is triggered when the percentage of manufacturer sales of ULEV or cleaner vehicles will be 50 percent or greater. The year 2004 was chosen based on ARB manufacturer sales projections.

## COMPLIANCE AUDITING AND ENFORCEMENT

PR1191 will require that affected public agencies keep sufficient records to document to document [sic] rule compliance, and that these records be maintained for a minimum of two years. The AQMD intends to audit these records at

the vehicle fleet location or by requesting appropriate documents to be submitted to the AQMD for review. The specific records to be kept by vehicle manufacturers include vehicle purchase date, vehicle make, model, model year, and ARB engine family number. If a public agency is found to be in non-compliance with rule requirements, then the public agency will be subject to penalties specified in Health and Safety Code Division 26, Part 4, Chapter 4, Article 3. The AQMD also plans to develop an enforcement guideline document that will stress the implementation of corrective actions by public fleets rather than punitive monetary penalties during the initial years of rule implementation, for first time violators.

To facilitate compliance by affected public agencies and minimize AQMD enforcement actions, any procurement materials that are used to acquire vehicles by the public agency (e.g., Request for Proposals, Request for Bids, and Request for Quotations) must include language that requires only Rule 1191 compliant vehicles be supplied to the public agency. For example, the following language could be used; "Vehicles shall be certified as Low emission Vehicle (LEV), Ultra-Low-Emission Vehicle (ULEV), Super-Ultra-Low-Emission Vehicle (SULEV), or Zero-Emission Vehicle (ZEV) by the California Air Resources Board, and shall comply with all applicable state and federal regulations."



**SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT**

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**Staff Report**

**Proposed Rule 1193 – Clean On-Road Residential and Commercial Refuse Vehicles**

**June 2000**

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## INTRODUCTION

The South Coast Air Quality Management District (AQMD) is proposing Rule 1193 (PR1193) to require fleets with 15 or more refuse collection vehicles (refuse trucks) operating in the District to acquire less-polluting vehicles when procuring or leasing these vehicles. This proposed rule applies to refuse collection vehicles operated by government agencies as well as privately owned refuse collection fleets that collect solid wastes, yard waste, or recyclable materials. For the purposes of the proposed rule, refuse collection vehicles are heavy-duty vehicles that collect solid waste, yard wastes, or recyclable materials from residential or commercial establishments, and private or publicly owned transfer stations.

This proposal is based on Health and Safety Code Section 40447.5, which was promulgated in 1987. Specifically, Health and Safety Code Section 40447.5 allows the AQMD



to require operators of public and commercial fleets, consisting of 15 or more vehicles, to purchase vehicles powered by methanol or other equivalently clean burning alternative fuel, when adding or replacing vehicle(s) to their fleet. Section 40447.5 specifically authorizes the AQMD to regulate fleets of 15 or more vehicles, operating substantially in the AQMD. This proposal is also based on Health and Safety Code Section 40919, which allows certain nonattainment air districts (those that are designated serious or above for ozone) to adopt measures requiring fleets to use a significant number of low-emission vehicles.

Despite the significant progress that has been made in reducing both mobile and stationary emissions over the past twenty years, the South Coast Air Basin (Basin), which includes Los Angeles, San Bernardino, Riverside, and Orange Counties, continues to experience extremely serious air quality problems, dominated by motor vehicle pollution. The Basin is still the only area in the country classified by U.S. Environmental Protection Agency (EPA) as an extreme ozone nonattainment area. Based on the latest information available, on-road motor vehicles contribute more than half of all hydrocarbons, oxides of nitrogen, and carbon monoxide to the entire emissions inventory. In addition, on-road motor vehicle pollution, specifically from diesel vehicles, has been identified as the principal source of public exposure to air toxics, based on recent work conducted by the AQMD and other agencies.

This proposed rule is being developed in an effort to reduce public exposure to air pollution emitted from refuse collection vehicles, including toxic particulates, and ozone precursor emissions. Many of these fleets emit pollutants, including air toxics, into heavily urbanized areas, where

improvements in air quality are critical given environmental justice and other concerns.

Refuse collection vehicles are covered in this proposed rule as part of an overall effort by the AQMD to reduce toxic, particulate, and ozone precursor emissions from public and private fleets operation in the AQMD. Refuse collection vehicles, in particular, represent an important opportunity to reduce these emissions, because of 1) the potential for centralized refueling, and 2) the availability and successful commercial use of lower-emitting refuse trucks.

Proposed Rule 1193 is one of a series of rules being proposed that affect vehicle fleet operations in the District. The AQMD's objective is to promote the use of less-polluting vehicle technologies. Depending on the effectiveness of the implementation of Proposed Rule 1193 and the other fleet rules under consideration, the use of less-polluting technology may spread to other types of fleets.

## BACKGROUND

Two important efforts to evaluate and identify air toxics are: (1) the AQMD Multiple Air Toxics Exposure Study II (MATES II); and (2) the California Air Resources Board's (ARB's) identification of particulate matter from diesel engine exhaust (as a surrogate for all diesel exhaust emissions including hydrocarbons) as a toxic air contaminant (TAC). The development of Proposed Rule 1193 is the result of these regulatory research efforts and the need for further criteria pollutant reductions. The development of the proposed rule is also affected by recent state and federal rulemaking efforts and actions that are intended to, or have resulted in, lowering on-road mobile source



emissions by reducing tailpipe emissions and/or requiring the sale or purchase of alternative fuel vehicles.

## MATES II

In March 2000, the AQMD Governing Board approved the release of the final report of the MATES II study. The objectives of this study were to monitor and evaluate urban air toxics, update the toxics emission inventories for the Basin, and conduct air toxic dispersion modeling to simulate the monitored data. During the course of the study, the ARB listed diesel particulate emissions as a toxic air contaminant. As such, the study provided an analysis of the potential air toxic impacts of diesel emissions. The study represented one of the most comprehensive air toxics programs ever conducted in an urban environment. The scope of the study included the monitoring of more than 30 toxic air pollutants at 24 sites over a one-year period ending in the spring of 1999. The AQMD collected more than 4,500 air samples, and together with the ARB, performed more than 45,000 separate laboratory analyses of these samples.

The findings of this study indicated that the cancer risk from some air toxics in the Basin has declined by as much as 75 percent over the last decade. However, it also showed that based upon more extensive monitoring of the variety of toxic compounds in the air, the current potential cancer risk from toxic air pollution averages about 1,400 in a million in the region. As shown in Figure 1, the study found that about 71 percent of this cancer risk is attributable to diesel particulate. Other important toxic species contributing significantly to this cancer risk, originating from both gasoline- and diesel-powered mobile sources as

well as stationary sources, are 1,3 butadiene (8 percent of risk), benzene (7 percent of risk), and carbonyls, which include formaldehyde and acetaldehyde (3 percent of risk). One objective of proposed Rule 1193, based on the findings of this study, is to reduce the contribution of overall toxic risk of diesel engine exhaust emitted by refuse collection fleets operating in the region, by accelerating the implementation of currently available less-polluting vehicle technology.



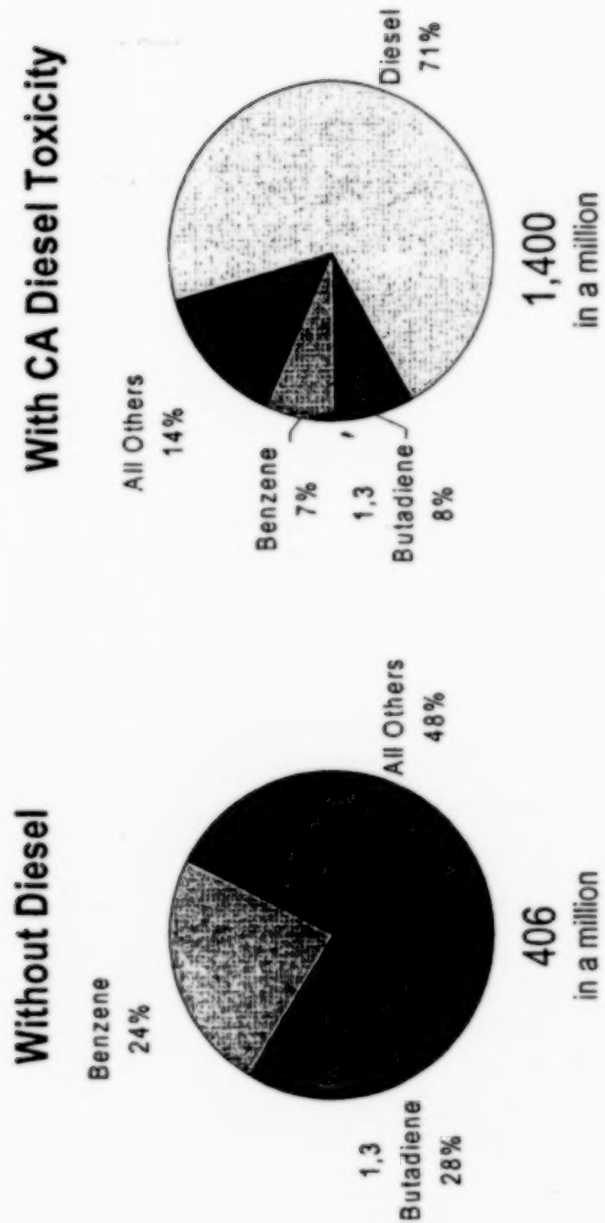


**Figure 1**

Estimated Average South Coast Air Basin Toxic Risk
Contributions based on findings from the MATES-II Study

## ARB Identification of Diesel Emissions as a Toxic Air Contaminant

In the early 1980s, the ARB established one of the nation's first comprehensive state air toxics programs – the California Air Toxics Program. Its goal is to protect public health by reducing toxic air emissions that pose the highest risk to Californians. This requires two separate steps. During the first step, risk assessment, the ARB identifies the highest risk substances called toxic air contaminants. In the second step, risk management, the ARB and local air pollution control districts investigate and adopt measures requiring air toxics sources to minimize risk to public health.

There are approximately 200 substances on the TAC list. More than 30 of these are found in diesel exhaust. On August 27, 1998, the TAC list was expanded to include particulate emissions from diesel engine exhaust, culminating a near-decade long scientific investigation into the health effects of exposure to the fine particles and other pollutants in diesel exhaust. Similar to the findings of the MATES II study, the ARB identification of diesel exhaust particulate matter (as a surrogate for all diesel exhaust emissions) as a TAC, provides another driving force for the AQMD to pursue the development of a refuse truck fleet rule as a strategy to mitigate public exposure to this pollutant.

## Refuse Collection Vehicle Operations – General Description

Waste hauling companies are regulated by local city and county governments. Section 40059 of the Public Resources Code specifically delegates state authority in this



area to local government agencies. Local governments provide the public with refuse collection services utilizing their own vehicle fleet and/or they permit a private company to provide this service in their area of jurisdiction. The vast majority of refuse collection services in the District are provided by private companies. Based on the best available information, only 19 local agencies utilized their own fleet vehicles to provide this service. Specific waste collection services provided by public or private fleets that are affected by PR1193 include (1) municipal solid waste collection to landfills, (2) recyclable materials collection, and (3) green waste collection.

Private companies are allowed to provide refuse collection services through a contract or franchise with local jurisdiction, in return for rate regulation. Alternatively, the local jurisdiction may permit a number of waste haulers to compete for business within that jurisdiction. Typically, services for residential solid waste collection are permitted by exclusive contract or franchise, whereas commercial accounts are serviced by a number of permitted waste hauling companies that compete with each other.

In general, the transfer of solid waste can be either from the source directly to a landfill, or from the source to a transfer station (e.g., a materials recovery facility) and finally to the landfill. The transfer station is an intermediary location where curbside waste collection vehicles deposit their solid waste, and larger trucks, with much greater load capacity, transport solid waste from the transfer station to the landfill. Both transfer stations and landfills are either publicly or privately owned.

Because the waste hauling industry is regulated by local city and county governments, no single government listing

has been compiled of refuse companies offering services throughout the District. Nevertheless, based on industry input, staff currently estimates that there may be approximately 6000 refuse trucks affected by PR1193. In an effort to refine this number, staff has surveyed local governments to provide the District with a list of waste hauling companies permitted to operate in their jurisdiction. To date, staff has compiled a list of approximately 300 waste hauling companies operating in the District, which was expected based on input from the waste hauling industry. Staff has surveyed these companies directly to obtain a profile of their fleet population and related data, such as fuel consumption and average vehicle life, that could help estimate the emissions benefit of the rule. (See Attachment 2, Refuse Vehicle Usage Survey Form.)

There are two basic chassis/engine combinations used for refuse trucks. The first type, for waste hauler use for curbside refuse collection or roll-off (refuse trucks that carry large bins to and from commercial sites) are typically of a GVW between 50,000 and 60,000 lb., and are generally powered by heavy-duty engines in the range of about 280 to 330 horsepower. These types of refuse trucks, based on industry input, constitute about 95 percent of all waste hauling vehicles. The second basic type of waste hauling vehicle is called a transfer vehicle. These resemble the largest line-haul trucks, in that they are designed with a GVW of up to 80,000 lb. and are powered by heavy-duty engines of about 400 hp. These vehicles specialize in transferring solid waste from transfer facilities to the landfills.



**Current Use of Natural Gas and Dual-Fuel Refuse Trucks**

*Characteristics of a Natural Gas Waste Hauler.* Natural gas refuse trucks can be powered by engines operated on LNG or CNG, or by dual-fuel engines that use both diesel fuel and natural gas. The natural gas fuel tanks add approximately 500 to 1500 lb. of weight to a refuse truck, which affects its payload capacity. Natural gas refuse truck engines are typically rated at 250 to 400 hp.

Although the cost of natural gas is generally less than that for diesels, natural gas usage is up to 20% greater when compared to diesel usage. However, one engine manufacturer claims equivalent fuel usage for their diesel and natural gas engines. In addition, elimination of alternative emission control devices on diesel heavy-duty engines may narrow the fuel economy gap as well, per the 1998 settlement agreement between ARB, U.S. EPA and the seven HDE manufacturers.

Attachment 3 lists information on the availability of natural gas engines and engine/chassis combinations that could be used in waste hauling vehicles. Attachment 4 lists the corresponding emissions related information for these engines. Engine manufactures producing dedicated natural gas engines for waste hauling applications include Cummins Engine Company, Deere Power Systems, Detroit Diesel Corporation, and Mack Truck Corporation. Certified conversion systems for Caterpillar electronic diesel engines are available from Caterpillar dealers. These conversion systems convert the diesel engine into a compression ignition natural gas engine (commonly known as a "dual-fuel" or "bi-fuel" engine. Chassis manufacturers currently offering or planning to offer refuse trucks utilizing these

engines are Crane Carrier, Freightliner Trucks, Mack Truck Corporation, Peterbilt, Western Star, and Alternative Fuel Technology (AFT). A number of these refuse trucks and engines are currently operating in the District. These include natural gas waste hauling operations in Orange, Riverside, and LA counties. Waste Management of the Desert in Palm Desert and Waste Management of Orange County use spark ignited natural gas engines in their refuse trucks, while Taormina in Anaheim uses compression ignited natural gas/diesel dual-fuel refuse and transfer trucks.

Based on industry input and staff observations, the operation of spark ignited natural gas powered refuse trucks has been successfully demonstrated from an overall operational standpoint. This has been specifically reported by Waste Management to District staff, based on their experience natural gas powered refuse trucks in the District and in other areas of the country. Within the District, Waste Management operates 30 natural gas powered refuse trucks in Coachella Valley (Waste Management of the Desert) and in Orange County. Natural gas powered refuse trucks have been successfully demonstrated to the point where Waste Management plans to convert their entire fleets, operating in the Coachella Valley to using natural gas.

The advantage of compression ignition natural gas over spark ignition natural gas are: a lower weight penalty from fuel tanks due to the superior fuel efficiency, less space required for fuel tanks due to the superior fuel efficiency, longer range due to the better fuel efficiency, lower capital cost due to fewer fuel tanks and lower capital cost due to the use of a standard base engine rather than a custom built spark ignition engine.



## GENERAL DESCRIPTION AND EXPLANATION OF RULE REQUIREMENTS

### Purpose of the Rule

The purpose of PR 1193 is to reduce criteria pollutants (NOx) and toxic (PM) emissions from municipal solid waste collection operations in the District. This is accomplished by requiring purchasers of fleet refuse trucks, when adding or replacing heavy-duty refuse trucks to their fleets, to purchase cleaner-burning, lower-emitting, alternative-fuel or dual-fuel heavy-duty refuse trucks, as commercially available. Alternative fuel is defined as compressed or liquefied natural gas, liquefied petroleum gas, methanol, electricity, fuel cells, or other advanced technology that does not rely on diesel fuel. Dual-fuel vehicles are equipped with a diesel engine that uses an alternative fuel in combination with the diesel fuel to enable compression ignition.

### Applicability

The proposed rule applies to public agencies and private companies that operate solid waste collection vehicles and their fleets consist of 15 or more solid waste collection (vehicles that operate on fixed routes and collects solid waste at residential or commercial establishments), transfer, or rolloff vehicles. PR1193 maximizes the air quality benefit for this fleet segment by taking advantage of the significant benefits of natural gas engine technology in terms of its inherently low NOx and PM emissions. In an effort to facilitate the transition from diesel to dedicated natural gas operation, PR1193 allows compression ignited dual-fuel technology for a limited time (prior to July 1, 2002) for purchases of solid waste collection

vehicles. However, dual-fuel vehicle purchases or leases is provided for transfer or rolloff vehicles with no time limitations. The time restriction is placed on the solid waste collection vehicles so that AQMD staff can futher [sic] evaluate the emission benefits of the dual-fuel technology in the solid waste collection duty cycle. Unlike the other vehicles where dual-fuel is allowed with no time limitations, these vehicles may use natural gas for a smaller part of their duty cycle and may not be as low emitting as in other duty cycles. As part of this evaluation, AQMD staff intends to evaluate all engine technologies as they are applied in the refuse collection operations.

For the purposes of PR1193, a heavy-duty truck is a vehicle having a GVW of at least 14,000 pounds. A refuse truck is one that is used for the express purpose of collecting and/or transporting solid waste, except hazardous waste, as defined in Section 40191(a) of the Public Resources code.

### Vehicle Purchase Requirements

The proposed rule would require that beginning July 1, 2001, public and affected private operators of fleets consisting of 50 or more solid waste collection vehicles and beginning July 1, 2002, for public and private operators with 15 or more solid waste collection vehicles or a combined total of 15 or more rolloff, transfer, or solid waste collection vehicles, when adding or replacing a heavy-duty refuse truck to their fleets, to purchase or lease an alternative-fuel heavy-duty refuse truck, as commercially available. In addition, the rule requirements would provide, the option of purchasing or leasing any solid waste collection vehicle having a dual-fuel engine that has been



ARB-certified to meet an optional NOx standard and a particulate emissions level equivalent to an alternative-fuel engine. Beginning July 1, 2001, for public or private operators with a combined total of 15 or more transfer or rolloff vehicles, all new purchases of transfer or rolloff vehicles must be equipped with an alternative-fueled or a dual-fuel engine. Vehicles that are contracted for purchase prior to the rule-effectiveness date are not required to comply with PR1193 purchase requirements. However, options to purchase vehicles exercised after the adoption of Rule 1193 would be subject to the rule requirements.

Permitted alternative fuels include compressed or liquefied natural gas, propane, methanol, electricity, fuels cells or other advanced technologies that do not rely on diesel fuel, consistent with allowable alternative fuels in ARB transit bus regulation. For the purposes of this rule, a dual-fuel engine is one that uses a combination of natural gas and diesel fuel, as described in the above sections.

### Exemptions

In response to comment from entities potentially affected by the proposed rule, PR1193 exempts certain types vehicles purchased from the utilization of alternative fuels. These include evaluation/test vehicles, vehicles not used for the express purpose of collecting and transporting solid waste from residential or commercial establishments to transfer stations or landfills, and alternative fuel model unavailability. These exemptions allow for promising experimental technologies to be demonstrated, clarify the intent of the rule, and address concerns regarding the possibility that a satisfactory alternative-fuel refuse truck may not be available for a specific niche application.

In addition, under emergency situation such as a natural disaster, conventionally-fueled refuse collection vehicles may be brought into the District as allowed under the AQMD Rule 118 if the Governor or President declares a state of emergency.

Comments were made that for smaller operators there may still be a need to provide some relief from the rule requirements if the infrastructure or funding for alternative fuel vehicles are not available. PR 1193 now provides language that the operator may make a case before the AQMD Hearing Board as provided in AQMD Regulation V to seek relief from the rule requirements, in some cases. Persons in violation of this rule are subject to all penalties and enforcement proceedings specified in the Health and Safety Code until such time as they obtain a variance from the District Hearing Board.

### Compliance Auditing and Enforcement

PR1193 will require that affected public agencies keep sufficient vehicle data records to document rule compliance, and that these records be maintained for a minimum of two years. The AQMD intends to audit these records, either at the vehicle fleet location or by requesting appropriate documents to be submitted to the AQMD for review. The specific data to be kept for each new vehicle will include the DMV Certificate of Title and registration, vehicle manufacturer, model-year, model, engine family number, fuel type, and fuel usage. In addition, to the preceding, affected fleets utilizing the exemption provision of the proposed rule must supply documentation proving the exemption of each exempt vehicle purchase to AQMD



upon request. If a public agency is found to be in non-compliance with rule requirements, then the public agency will be subject to penalties specified in Health and Safety Code Division 26, Part 4, Chapter 4, Article 3. The AQMD also plans to develop an enforcement guideline document that will stress the implementation of corrective actions by public fleets rather than punitive monetary penalties during the initial years of rule implementation, for first time violators.

## EMISSION BENEFITS

### Criteria Pollutants

The goal of the proposed fleet rule is to reduce PM and NOx emissions through the introduction and use of cleaner-burning vehicles. These emission benefits are expected to primarily consist of reduced toxic exposure to diesel particulate matter and reduced emissions of nitrogen oxides. With regard to the criteria pollutants, PR1193 is specifically based on achieving emission reductions beyond the mandatory U.S. EPA and ARB heavy-duty engine emission standards. The emission benefits for PR1193 are based on refuse truck fleets purchasing alternative-fueled refuse trucks instead of diesel refuse trucks.

Emission reduction estimates were originally developed for the entire suite of fleet rules using an approach based on vehicle-miles-traveled (VMT) data from the latest ARB-approved emissions inventory model, EMFAC7G. Based on this approach and on general assumptions that apply to all heavy-duty vehicles in all of the proposed fleet rules, estimates for the year 2010 would be 11 to 16 tons per year of PM and 75 tons per year of NOx.

However, one of the largest waste hauler fleet operators noted that, for a typical refuse truck operation, much of the fuel consumption (and, thereby, emissions) occurs in activities that produce substantially more emissions compared to an average heavy-duty vehicle – that is, in the loading of curbside trash into the refuse truck, in frequent or prolonged engine idle, and in frequent low-speed stop-and-go driving conditions. Therefore, the emission reduction estimates presented below have been based on total fuel consumption, covering both travel and collection activities. Emission reductions were specifically determined using input provided by the waste hauling industry, and the Carl Moyer Program methodology for quantifying emission reductions for natural gas heavy-duty vehicle projects, including waste hauling projects. In addition, based on input from ARB staff, this methodology should provide an improved estimate of emission reductions from clean fuel fleet operations. The following formula and assumptions are utilized [sic] the emission reductions for PR1193.

Annual ER = (Number of vehicles) *
(Annual Fuel consumption, gal)*
(18.5 bhp-hr/gal) * (Mandatory std –
Optional std) / Useful life

Assumptions:

1. Incorporate adopted ARB & U.S. EPA emission standards, to ensure surplus emission reductions only.
2. Rule implementation starts July 1, 2001.
3. Rule affects 6000 refuse trucks (based on industry input).



4. Diesel fuel consumption equals 10,000 gallons per vehicle per year (based on industry input).
5. Useful life equals 12 years (industry input is 10 to 15 years).
6. The following NOx emission rates are used for diesel powered refuse trucks:

| Timeframe | Rate | Explanation |
|---|---|---|
| 2001 – 9/2002 | 4.0 g/bhp-hr | Mandatory ARB/U.S. EPA Emission Std. |
| 10/2002 – 2010 | 2.0 g/bhp-hr | Nominal NOx emission level assumed by ARB as the NOx portion of the mandatory 2.5 g/bhp-hr NMHC+NOx emission standard, based on ARB staff input. |

7. The following NOx emission rates are used for alternative-fuel powered refuse trucks:

| Timeframe | Rate | Explanation |
|---|---|---|
| 2001 – 9/2002 | 2.5 g/bhp-hr | Based on ARB staff input and certification standards for natural gas heavy-duty engines. |
| 10/2002 – 2010 | 1.4 g/bhp-hr | Based on discussions and concurrence with ARB technical staff regarding the appropriate nominal NOx emission level that corresponds with the expected certification level of 1.8 g/bhp-hr NMHC+NOx for alternative-fuel heavy-duty engines in this time frame. |

8. PM standard for diesel HDEs is based on 0.1 g/bhp-hr emission standard.

9. For alternative fuels (e.g., natural gas), an average PM level of 0.03 g/bhp-hr is assumed, based on ARB input and certification data for HDEs. Also, this emission level is consistent with the PM standard for the alternative-fuel path in the recently adopted ARB Urban Bus Fleet Rule.

Based on the methodology and assumptions above, Table 3 details the emission reductions on a yearly basis for the years 2001 through 2010.

**Table 3**

**Proposed Rule 1193 Emission Reduction Estimates**

(Tons per year)

| | Oxides of Nitrogen | | Particulate Matter | |
|---|---|---|---|---|
| Year | Current | Cumulative | Current | Cumulative |
| 7/2001 – 2002 | 76 | 76 | 4 | 4 |
| 2002 – 2003 | 130 | 206 | 7 | 11 |
| 2003 – 2004 | 61 | 267 | 7 | 18 |
| 2004 – 2005 | 61 | 329 | 7 | 25 |
| 2005 – 2006 | 61 | 390 | 7 | 32 |
| 2006 – 2007 | 61 | 451 | 7 | 39 |
| 2007 – 2008 | 61 | 512 | 7 | 46 |
| 2008 – 2009 | 61 | 573 | 7 | 53 |
| 2009 – 2010 | 61 | 634 | 7 | 61 |
| 2010 – 2011 | 61 | 695 | 7 | 68 |



**Air Toxics**

Estimated Relative Toxicity of Diesel and Natural Gas Powered Refuse Trucks.

The relative air toxic risks of diesel and corresponding natural gas refuse trucks were estimated using an approach based on determining weighted toxic risk factors for the two fuels under consideration. The weighted toxic risk factor is determined by multiplying the individual toxic constituents of the exhaust by their respective cancer potency factor, and then proportionately adjusting these values by an estimated annual mass emission rate of particulate matter (PM) and non-methane hydrocarbon emissions (NMHC). The purpose of this analysis is to use these weighted toxicity factors to estimate the number of natural gas refuse trucks roughly equivalent to one diesel refuse trucks [sic] based on toxic risk.

For the purposes of this analysis, the toxic component analyzed for diesel refuse trucks is limited to total PM emissions. This is because ARB staff has indicated that the toxic risk factor for diesel PM already incorporates toxic risks from all other constituents in diesel exhaust. For natural gas refuse trucks, the relative toxic risk was estimated based on the PM contribution of nickel and hexavalent chromium emissions, and the NMHC emissions of formaldehyde, acetaldehyde, benzene, and 1,3 butadiene. ARB speciation profiles were used to develop nickel and hexavalent fraction of the natural gas PM exhaust. With regard to NMHC components, a paper from West Virginia University (SAE paper 972971) was used to develop the benzene and 1,3 butadiene NMHC fractions, and an ARB speciation profile from an industrial natural gas-powered internal combustion engine was used to develop the formaldehyde and acetaldehyde NMHC

fractions. (The West Virginia University paper provided speciation data generated from a CNG-powered engine used in on-road vehicle applications, but did not specifically include formaldehyde and acetaldehyde data.)

For the purposes of this specific analysis, the annual PM emission rates for diesel and natural gas refuse trucks were developed using the same assumptions contained in the criteria pollutant benefit methodology. These assumptions include diesel refuse truck emissions of 0.1 g/bhp-hr for 2000 and subsequent years, and natural gas refuse truck emissions of 0.03 g/bhp-hr for 2000 and beyond. The annual mass emission rate of NMHC emissions for natural gas engines is highly variable based on input received by engine manufacturers, as evidenced by ARB certification data for natural gas engine families approved for sale in California. For the purposes of this analysis, a range of NMHC emissions was estimated using this certification data. Using this range, which corresponds to 0.3 g/bhp-hr to 0.8 g/bhp-hr, for the 2000-to-9/2002 time period and 0.3 to 0.5 g/bhp-hr for the 10/2002-and-later time period, assumed conversion factor of 18.5 bhp-hr/gal for refuse trucks, and an assumed fuel consumption for refuse trucks of 10,000 gal/yr, annual NMHC emissions were determined.

Table 4 shows the annual PM and NMHC mass emission rates, relative toxicity factors for PM and NMHC exhaust components, and the overall weighted toxicity factor. Based on these overall weighted toxicity factors, Table 5 shows the number of CNG refuse trucks that is roughly equivalent to one corresponding diesel-powered refuse trucks [sic]. The number is equal to the overall weighted toxicity factor for the diesel refuse trucks divided by the corresponding value for the natural gas refuse trucks.



Different time frames are utilized in this analysis to account for more stringent emission standards for NOx, and NMHC that are implemented in the overall time frame being analyzed.

Based on this analysis, it can be concluded that significant toxic emission benefits will occur on a per vehicle basis from the use on a natural gas refuse truck versus a diesel refuse truck. Depending on the time frame, one diesel refuse truck is estimated to have the same toxicity as up to 74 corresponding natural gas refuse trucks, as shown in Table 5. Depending on the availability of particulate traps that are still under development by control device and engine manufacturers, this ratio may be expected to decrease.

**Table 4**

**ESTIMATED RELATIVE TOXIC RISK**

| POLLUTANT | COMPOUND | 2000 THRU 9/2002 | | 10/2000 & LATER | |
|---|---|---|---|---|---|
| | | DIESEL | CNG | DIESEL | CNG |
| PM (lb/yr) | | 40.7 | 12.2 | 40.7 | 12.2 |
| NMHC (lb/yr) | | --- | 122-326 | --- | 122-204 |
| *Resultant Emission-weighted Toxicity Risk Factors* | | | | | |
| | DIESEL PM[1] | 122.2 | --- | 122.2 | --- |
| | METALS[2] | --- | 0.41 | --- | 0.41 |
| | NMHC[3] | --- | 1.24-3.31 | -- | 1.24-2.08 |
| | OVERALL WEIGHTED TOXIC RISK | 122.2 | 1.65-3.72 | 122.2 | 1.65-2.49 |

1. Based on ARB input, the unit risk factor associated with diesel PM includes toxic risk contributions for all other compounds in exhaust.
2. Toxic risk for PM exhaust in CNG vehicles based on nickel and hexavalent chromium ($Cr^{+6}$).
3. Toxic compounds in NMHC exhaust emissions for CNG vehicles included in this analysis are formaldehyde, acetaldehyde, benzene, and 1,3 butadiene.

**Table 5**

**ESTIMATED VEHICLE TOXIC RISK RATIO[1]**

| TIME PERIOD | RISK RATIO | |
|---|---|---|
| | MINIMUM | MAXIMUM |
| 2000 thru 9/2002 | 33 | 74 |
| 10/2002 and later | 49 | 74 |

1. Number of CNG vehicles equal to one equivalent diesel vehicle based on toxic risk.

## COST ANALYSIS

### Fleet Cost Impacts

Increased capital and operational cost associated with compliance with the proposed rule is expected. However, individual cost impacts will vary depending on the individual public agency or private fleet. Cost impacts may be incurred through increased purchase, maintenance, building upgrade, and refueling infrastructure costs. These impacts may be partially offset by lower fuel costs.

The capital cost of a spark ignition natural gas vehicle is more expensive than a comparable diesel model by a differential of approximately $40,000 per truck whilc [sic]



compression ignition gas versions of similar trucks have demonstrated a price differential of $25,000 to $30,000. This is primarily a result of the current low-volume production of natural gas vehicles. It is possible with larger production volumes and economies of scale, the capital cost is projected to decrease, based on an industry estimate, to about $25,000 per vehicle for a spark ignition natural gas vehicle in the near term.

The maintenance costs of current CNG engines used in waste hauling operations are generally higher, but manageable, according to waste hauling industry representatives. It is expected that these maintenance costs will decrease as natural gas engine technology matures, according to natural gas heavy-duty engine industry input. As is common with new technologies, the maintenance costs for the first generation of natural gas vehicles are generally higher than for diesels. With increasing experience and training, maintenance issues have been resolved. At the same time, fleets have changed their preventative maintenance schedules to take advantage of the benefits of natural gas – especially the greatly increased oil life and reduced engine wear. For example, John Deere advertises "diesel-like fuel economy, longer service intervals, easier servicing, less downtime, and longer engine life" with regard to natural gas powered heavy-duty engines. The result has been a steady reduction in NGV maintenance costs. There have been numerous examples of fleets, in transit operations, that have experienced natural gas vehicle maintenance cost impacts that have been very comparable to their diesel counterparts. Staff believes that fleets operating natural gas powered refuse trucks as well will experience these positive results.

For example, Pierce Transit ~~in~~ Washington, with a fleet including many first and second generation CNG engines, has experienced total maintenance and oil costs of 16.4 cents per mile on its CNG buses, compared to 16.2 cents per mile for its diesel buses. The Antelope Valley School district experienced average maintenance costs of 13 cents per mile on 16 CNG school buses equipped with Deere engines, compared to 21 cents per mile for diesel buses purchased about the same time, and 24 cents per mile for its existing diesel buses. For a fleet of 136 1993-1996 CNG buses, Sacramento Regional Transit District found its maintenance costs to be 18.1 cents per mile in 1997, compared to 27.7 cents per mile for its fleet of 73 1985-1990 diesel buses. Sunline Transit Agency in the Palm Springs area reported average maintenance costs of 18.4 cents per mile for 34 1993-model CNG buses. Sunline has estimated that their overall costs have decreased by 27 percent through the use [sic] compressed natural gas (CNG) urban buses compared to diesel-powered buses.

The socioeconomic report prepared by the AQMD staff provides additional information relative to the costs and potential economic impacts of PR1193. Using the cost impacts ascribed to PR1193 and the emission benefits as detailed above based on best-available information, the cost-effectiveness ranges between $8,000 per ton of emission reduction for the "best-case funding scenario" and $40,000 per ton of emission reduction for the worst-case funding scenario. The "most likely funding scenario" is $25,000 per ton of emission reduction.



**Incremental Cost-Effectiveness Analysis**

Health and Safety Code Section 40920.6 requires an assessment of incremental cost effectiveness for proposed regulations relative to ozone, CO, SOx, NOx, and their precursors. Incremental cost effectiveness is defined as the difference in control costs divided by the difference in emission reductions between two potential control options that can achieve the same emission reduction goal of a regulation. Compared to Proposed Rule 1193, incremental cost effectiveness of including non-waste hauling vehicles into the vehicle count as a result of including fleets where the total number of vehicles is 15 or more, but do not have 15 vehicles used in waste hauling activities, for determining the proposed rule's applicability is $28,900 per ton of combined pollutants (NOx and PM) assuming no funding. Approximately 1,200 waste hauling vehicles and five natural gas refueling stations would be added as a result of the analysis.

**Funding Programs**

Various federal, state and local funding programs are available to assist public waste hauling agencies (and, in some programs, their private partners) in the acquisition and operation [sic] alternative-fuel heavy-duty refuse trucks. These are generally described below. In addition, a more detailed discussion of these funding sources is included in the socioeconomic report that is currently being prepared by AQMD staff.

*State Energy Program.* States will promote the conservation of energy, reduce the rate of growth of energy demand, and reduce dependence on imported oil through the development and implementation of a comprehensive

State Energy Program. The State Energy Program is the result of the consolidation of two formula grant programs – the State Energy Conservation Program and the Institutional Conservation Program. The State Energy Program includes provisions for competitively awarded financial assistance for a number of state-oriented special project activities, including alternative fuels. In addition to funding for special project activities, states may choose to allocate base formula funds to programs to accelerate the use of alternative fuels for government vehicles.

For more information, contact your State Energy Office or the DOE Regional Office for your region, listed under the Points of Contact section for your state, or contact Ron Santoro at DOE Headquarters at (202) 586-8296.

*The Carl Moyer Program* was established by ARB to provide incentives to encourage and expedite implementation of the cleanest commercially available vehicles, and specifically to reduce emissions from heavy-duty engines. The incentives are grants for offsetting the higher costs of primarily alternative-fuel heavy-duty vehicles, and for supporting the fueling infrastructure. The ARB has established overall program requirements and allocates funds to local air districts, including AQMD, for local program administration. To date, both dedicated natural gas and dual-fuel refuse trucks have been approved for funding by the Governing Board.

The AQMD contact is Cindy Sullivan (AQMD) at 909-396-3249.

*Mobile Source Air Pollution Reduction Review Committee's (MSRC) Discretionary Funds.* This annual work program, that typically includes an HDV incentive program, pays



the incremental cost for the purchase of new OEM alternative-fuel engines and vehicles.

Thirty percent of the funds collected each year from a $4 surcharge on vehicle registration created by **AB 2766** (Sher) goes to the Mobile Source Air Pollution Reduction Review Committee **(MSRC)** to be used to implement programs to reduce mobile source emissions. Managers of the program have apportioned the available funding into several technology-specific categories, including alternative-fuel heavy-duty refuse trucks. To date, both dedicated natural gas and dual-fuel refuse trucks have been approved for MSRC Program funding by the Governing Board.

The AQMD contact is Ray Gorski (MSRC Technical Advisor) at 909-396-2479.

*Local Government Subvention Funds.* Forty percent of the AB 2766 funds collected go to local governments based on a pro-rated share of population and must be used to reduce mobile source emissions. Cities can use their funds to purchase alternative-fuel vehicles or engines. While these funds are used primarily by municipalities for their own projects, these monies can be allocated by the city for public-private partnerships to pursue AFV and EV projects. Funds not expended carry over from year to year.

The AQMD staff contacts are Larry Rhinehart (AQMD) at 909-396-2898 and Oscar Abarca (AQMD) at 909-396-3242.

Current and recent users and applicants of the above co-funding programs include the following. Waste Management, Inc., currently operates 30 natural gas refuse trucks in the District, and plans an additional 200 CNG and LNG trucks during the next two years, along with six new

natural gas fueling stations. The Carl Moyer Program will provide partial funding for 50 refuse trucks, 9 new and 41 re-powers. Burrtec Waste Industries, Inc., operates 175 refuse trucks in Riverside, Fontana, Victorville, Irwindale, and Yucaipa. Burrtec replaced 13 diesel trucks in last year's Carl Moyer Program and is planning to replace 42 more this year. The new trucks are powered by dual-fuel (LNG/diesel) engines. Other applicants to the Carl Moyer Program this year are BFI (Sunshine Canyon) for 10 dual-fuel trucks, CalMet Services (Montebello-Downey-Cerritos) for 30 repowered CNG trucks, USA Biomass Corporation for 13 repowers to dual-fuel trucks, Spartan Cleanup Corporation for 8 repowers to dual-fuel trucks, and Palm Spring Disposal Services for the purchase of 6 new CNG refuse trucks.

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RESOLUTION NO. 00-19

**A Resolution of the South Coast Air Quality Management District (AQMD) Governing Board certifying the Final Program Environmental Assessment and adopting the Statement of Findings and Statement of Overriding Considerations, Mitigation Monitoring Plan for the Proposed Fleet Vehicle Rules, including Proposed Rule 1192 – Clean On-Road Transit Buses.**

**A Resolution of the Governing Board adopting Rule 1192 – Clean On-Road Transit Buses.**

**WHEREAS**, the Governing Board has determined that the Proposed Fleet Vehicle Rules, including Proposed Rule 1192 – Clean On-Road Transit Buses, are a "project" pursuant to the terms of the California Environmental Quality Act (CEQA); and

**WHEREAS**, the AQMD has had its regulatory program certified pursuant to Public Resources Code §21080.5 and has conducted CEQA review pursuant to such Program (AQMD Rule 110); and

**WHEREAS**, AQMD staff has prepared a Draft Program Environmental Assessment (PEA) pursuant to its certified regulatory Program and state CEQA Guidelines §15252 setting forth the potential environmental consequences of the Proposed Fleet Vehicle Rules, including Proposed Rule 1192 – Clean On-Road Transit Buses; and

**WHEREAS**, the Draft PEA was released for a 45-day public review and comment period from March 10, 2000 to April 25, 2000. During the 45-day public review and comment period, the AQMD received a total of eight comment letters; and

**WHEREAS**, the Final PEA for the Proposed Fleet Vehicle Rules, including Proposed Rule 1192 – Clean On-Road Transit buses includes responses to all comments received on the Draft PEA; and

**WHEREAS**, it is necessary that the adequacy of the Final PEA for the Proposed Fleet Vehicle Rules, including Proposed Rule 1192 – Clean On-Road Transit Buses, be considered by the Governing Board prior to its adoption; and

**WHEREAS**, significant environmental impacts were identified from implementing the Proposed Fleet Vehicle Rules that cannot be mitigated to a level of insignificance; and

**WHEREAS**, the AQMD Governing Board voting on this Resolution has reviewed, and considered the Final PEA for the Proposed Fleet Vehicle Rules, including Proposed Rule 1192 – Clean On-Road Transit Buses; and

**WHEREAS**, it is necessary that the AQMD prepare a Statement of Findings, Statement of Overriding Considerations and Mitigation Monitoring Plan pursuant to state CEQA Guidelines §15091, 15093, and 15097, respectively, regarding adverse environmental impacts for the implementation of all the Proposed Fleet Vehicle Rules that cannot be mitigated to insignificance;

**WHEREAS**, the Governing Board has determined that the socioeconomic impact assessment and staff report of the Proposed Fleet Vehicle Rules, including Proposed Rule 1192, is consistent with the Governing Board March 17, 1989 and October 14, 1994 resolutions and the provisions of Health and Safety code Sections 40440.8, 40728.5 and 40920.6; and



**WHEREAS**, the Governing Board has reviewed and considered the staff's findings related to cost and employment impacts of Proposed Fleet Vehicle Rules, including Proposed Rule 1192 – Clean On-Road Transit Buses, as set forth in the socioeconomic impact assessment, and hereby finds and determines that cost and employment impacts are as set forth in that assessment; and

**WHEREAS**, the Governing Board has determined that Proposed Fleet Vehicle Rules, including Proposed Rule 1192 – Clean On-Road Transit Buses, are not short-term control measures in the amended 1997 Air Quality Management Plan (AQMP) in 1999 and thus, were not ranked by cost-effectiveness relative to other AQMP control measures in the amended 1997 AQMP and further that cost-effectiveness in terms of dollars per ton of pollutant reduced is not applicable to rules regulating toxic air contaminants. This, however, does not imply that cost considerations are not applicable in development of toxic rules; and

**WHEREAS**, the Governing Board has determined that staff has actively considered the socioeconomic impact analysis and made a good faith effort to minimize any socioeconomic impacts; and

**WHEREAS**, the Governing Board obtains its authority to adopt, amend, or repel rules and regulations from Sections 39002, 39650 et. seq., 40000, 40001, 40440, 40441, 40463, 40702, 40725 through 40728, 40910 through 40920.5, 41508, 41700, 41706, 42300, and 44390 through 44394 of the California Health and Safety Code; and

**WHEREAS**, the Governing Board is given specific authority relative to public and commercial fleet vehicles

under Sections 40919(a)(4) and 40447.5(a) of the California Health and Safety Code; and

**WHEREAS**, the Governing Board has determined that a need exists to adopt Proposed Rule 1192 – Clean On-Road Transit Buses to reduce public health exposure to criteria pollutant and toxic air contaminants, to meet state and federal ambient air quality standards, to meet the intent of the Board's Environmental Justice Initiatives, and to clarify the intent and implementation of Rule 1192 requirements; and

**WHEREAS**, the Governing Board has determined that Proposed Rule 1192 – Clean On-Road Transit Buses, as proposed is written or displayed so that its meaning can be easily understood by the persons directly affected by the proposed rule; and

**WHEREAS**, the Governing Board has determined that Proposed Rule 1192 – Clean On-Road Transit Buses, as proposed is in harmony with, and not in conflict with or contradictory to, existing federal or state statutes, court decisions, or regulations; and

**WHEREAS**, the Governing Board has determined that Proposed Rule 1192 – Clean On-Road Transit Buses, as proposed does not impose the same requirements as any existing state or federal regulation and the proposed rules are necessary and proper to execute the powers and duties granted to, and imposed upon, the District; and

**WHEREAS**, the Governing Board has determined that Proposed Rule – Clean On-Road Transit Buses, as proposed, references the following statutes which the AQMD hereby implements, interprets or makes specific: H&S Code Sections 40001 (rules to achieve ambient air



quality standards), 40440(a) (rules to carry out AQMP), and 40447.5(a) (rules to require fleets of 15 or more vehicles operating substantially in the AQMD to purchase vehicles powered by methanol or other equivalently clean burning alternative fuel when adding or replacing vehicles), 40919(a)(4) (requires significant numbers of low-emission vehicles in fleets); and

**WHEREAS**, the Governing Board has found that there is a problem that Propose [sic] Rule 1192 will help alleviate, namely continued exceedances of state and federal ambient air quality standards, and that this rule will promote the attainment of these standards; and

**WHEREAS**, the Governing Board finds and determines that the requirements of this rule are, in the aggregate, at least as protective of public health and welfare as applicable Federal standards; and

**WHEREAS**, a public hearing has been properly noticed in accordance with the provisions of Health and Safety Code Section 40725; and

**WHEREAS**, the Governing Board has held a public hearing in accordance with all provisions of law; and

**WHEREAS**, the Governing Board finds and determines, taking into consideration the factors in Section (d)(4)(D) of the Governing Board Procedures, that the modifications adopted which have been made to the proposed rule since notice of public hearing was published do not significantly change the meaning of the proposed rule within the meaning of Health and Safety Code Section 40726 and are not significant pursuant to CEQA Guidelines Section 15088.5; and

**WHEREAS**, the AQMD specifies the Deputy Executive Officer of Rule 1192 as the custodian of the documents or other materials which constitute the record of proceedings upon which the adoption of this proposed rule is based, which are located at the South Coast Air Quality Management District, 21865 E. Copley Drive, Diamond Bar, California; and

**WHEREAS**, a need exists to have staff resources identified to assist affected parties in implementing on-road fleet vehicle rules; and

**WHEREAS**, the California Air Resources Board (CARB) Transit Bus Regulations do not consider hybrid diesel electric technologies that use diesel fuel for use under the transit bus rule alternative-fuel path; and

**WHEREAS**, CARB has committed to study and evaluate the role of hybrid diesel electric technologies that use diesel fuel and make recommendations to its Board on the role of these technologies.

**WHEREAS**, some diesel engine manufacturers hope to make future improvements in conventionally-fueled engines via emissions control technologies and low sulfur diesel fuel to achieve significantly lower nitrogen oxides, particulate matter, and toxic emission levels similar to existing alternative fuel engines; and

**WHEREAS**, the Governing Board has determined there is a need for staff to provide monitoring and implementation updates on progress and issues related to Rule 1192 to the Governing Board.

**NOW, THEREFORE, BE IT RESOLVED** that the Governing Board does hereby approve the written responses to the comments to the Draft PEA for the Proposed Fleet



Vehicle Rules, including Proposed Rule 1192 – Clean On-Road Transit Buses, adopt Attachment 1 including the contained Statement of Overriding Considerations, and Mitigation Monitoring Plan and certify the Final PEA for the Proposed Fleet Vehicle Rules, including Proposed Rule 1192 – Clean On-Road Transit Buses, which was completed in compliance with CEQA and Rule 110 provisions; and find that the Final PEA was presented to the Governing Board, whose members reviewed, considered, and approved the information therein prior to acting on Proposed Rule 1192 – Clean On-Road Transit Buses; and

**BE IT FURTHER RESOLVED** that the Governing Board hereby adopts the Statement of Findings and Statement of Overriding Considerations pursuant to state CEQA Guidelines §§15091 and 15093, respectively, regarding adverse environmental impacts that cannot be mitigated to insignificance; and adopts the Mitigation Monitoring Plan pursuant to Public Resources Code §21081.6; which are included in Attachment 1, attached and incorporated herein by reference.

**BE IT FURTHER RESOLVED**, that the Governing Board does hereby approve the written response to CEQA comments.

**BE IT FURTHER RESOLVED**, that the Governing Board does hereby approve the Economic Assessment Report.

**BE IT FURTHER RESOLVED**, that the Governing Board does hereby direct staff to identify in the FY 2000-2001 Fiscal Year Budget a staff position for a "Fleet Rule Implementation Officer" who will assist affected parties in implementing the fleet vehicle rules. The Fleet Rule

Implementation Officer will initially report directly to the Executive Officer.

**BE IT FURTHER RESOLVED**, that the Governing Board does hereby direct staff to work with CARB staff in evaluating the hybrid-electric and dual-fuel technologies that use diesel fuel and provide annual reports to the Governing Board on the emission reduction potential and make recommendations for potential inclusion in Rule 1192.

**BE IT FURTHER RESOLVED**, that the Governing Board does hereby direct staff to continue to work with transit operators to secure funding needed to implement Rule 1192 and to place a high priority on Rule 1192 implementation relative to the Carl Moyer program.

**BE IT FURTHER RESOLVED**, that the Governing Board does hereby direct staff to notify the Governing Board of any changes in state or federal law that may expand or clarify the authority of the AQMD to pursue a fuel neutral fleet rule policy and other policy changes as adopted, and to recommend revisions to the rule to be consistent with state or federal statutory requirements.

**BE IT FURTHER RESOLVED**, that the Governing Board does hereby direct staff to work with shareholders to evaluate the possibility of expanding the compliance flexibility provisions of the rule to allow programs such as an exchange mechanism between various vehicle types (light, medium and heavy duty), and between fleets within the region. Within six months, staff shall report to the Governing Board with its findings and recommendations.



**BE IT FURTHER RESOLVED**, that the Governing Board does hereby direct the AQMD Technology Advancement Office to hold an annual symposium to review the research, development, and demonstration of advanced diesel technology, electric vehicles, hybrid vehicles, fuel cell powered vehicles, and other advanced vehicles and to include a summary of the findings in an annual report to the Governing Board.

**BE IT FURTHER RESOLVED**, that the Governing Board does hereby direct staff to return to the Governing Board with proposed amendments to Rule 1192 to allow an exemption for the purchase of a conventionally fueled vehicle where the engine and control device have been approved by CARB to meet certification emission levels which achieve at least a 54 percent reduction in nitrogen oxide and a 71 percent reduction in particulate matter exhaust emissions from the currently available conventionally fueled engine (family) certification emission levels approved by CARB (as of the date of adoption of this rule); and which achieves a reduction in toxic risk equivalent to the level which would be achieved, on average, by currently available alternative fueled engines certified by CARB. Equivalent toxic risk shall be calculated based upon unit risk factors as approved by the California Office of Environmental Health Hazard Assessment (OEHHA). Procedures for calculating the toxic risk reduction shall be developed in consultation with CARB and OEHHA, within 90 days of the date of adoption of this rule and presented to the Governing Board as an informational item. Staff shall propose such rule amendments within 90 days of receipt of sufficient technical information establishing that the above criteria have been satisfied.

The Governing Board also directs staff to periodically review the above guidance relative to technology advancement and to report back to the Governing Board at such time as changes may be appropriate.

**BE IT FURTHER RESOLVED,** that the Governing Board does hereby request CARB to consider the feasibility of further enhancing its heavy-duty engine and urban bus certification procedures to better reflect in-use emissions over representative duty cycles.

**BE IT FURTHER RESOLVED**, that when CARB updates its heavy-duty engine and urban bus certification procedures, that the AQMD will utilize such procedures relative to Rule 1192.

**BE IT FURTHER RESOLVED**, based on the findings in the annual progress report described above, staff may recommend modifications to the rule requirements for the Governing Board's consideration.

**BE IT FURTHER RESOLVED**, that the Governing Board does hereby adopt, pursuant to the authority granted by law, Proposed Rule 1192 – Clean On-Road Transit Buses, as set forth in the attached and incorporated herein by reference.

Attachments

AYES: Antonovich, Bernson, Burke, Carney, Coad, Glover, LaPisto-Kirtley, Loveridge, Mikels, Paulitz, Verdugo-Peralta and Wilson

NOES: None

DATE: 6-16-00 /s/ Jackie Dix
Jackie Dix, Clerk of the Board



RESOLUTION NO. 00-29

**A Resolution of the South Coast Air Quality Management District (AQMD) Governing Board approving the finding that the potential adverse environmental impacts from adopting Rule 1196 – Clean On-Road Heavy-Duty Public Fleet Vehicles, are within the scope of the previously prepared and certified Program Environmental Assessment for the Proposed Fleet Vehicle Rules and Related Rule Amendments, and that no new environmental document is required.**

**A Resolution of the Governing Board adopting Rule 1196 – Clean On-Road Heavy-Duty Public Fleet Vehicles.**

**WHEREAS**, the Governing Board has determined with certainty that Proposed Rule 1196 – Clean On-Road Heavy-Duty Public Fleet Vehicles is a "project" pursuant to the terms of the California Environmental Quality Act (CEQA); and

**WHEREAS**, the AQMD has had its regulatory program certified pursuant to Public Resources Code § 21080.5 and has conducted CEQA review pursuant to such Program (AQMD Rule 110); and

**WHEREAS**, AQMD staff has prepared a Draft Program Environmental Assessment (PEA) pursuant to its certified regulatory Program and state CEQA Guidelines §§ 15168 and 15252 setting forth the potential environmental consequences of the Proposed Fleet Vehicle Rules and Related Rule Amendments, including Proposed Rule

1196 – Clean On-Road Heavy-Duty Public Fleet Vehicles; and

**WHEREAS**, the Draft PEA was released for a 45-day public review and comment period from March 10, 2000 to April 25, 2000. During the 45-day public review and comment period, the AQMD received a total of eight comment letters; and

**WHEREAS**, the Final PEA for the Proposed Fleet Vehicle Rules and Related Rule Amendments, including Proposed Rule 1196 – Clean On-Road Heavy-Duty Public Fleet Vehicles, includes responses to all comments received on the Draft PEA and was certified by the Governing Board on June 16, 2000; and

**WHEREAS**, consistent with CEQA Guidelines § 15168(c)(2) the AQMD is relying on the Final PEA prepared for the Proposed Fleet Vehicle Rules and Related Rule Amendments to serve as the CEQA document for Proposed Rule 1196 – Clean On-Road Heavy-Duty Public Fleet Vehicles, because the proposed project would not cause any new environmental impacts to occur or require new mitigation measures that have not already been addressed in the previously prepared and certified Final PEA; and

**WHEREAS**, significant environmental impacts were identified from implementing the Proposed Fleet Vehicle Rules and Related Rule Amendments that cannot be mitigated to a level of insignificance; and

**WHEREAS**, the Governing Board voting on this Resolution has reviewed, and considered the previously prepared and certified Final PEA for the Proposed Fleet



Vehicle Rules, including Proposed Rule 1196 – Clean On-Road Heavy-Duty Public Fleet Vehicles; and

**WHEREAS**, it is necessary that the AQMD prepare a Statement of Findings, Statement of Overriding Considerations and Mitigation Monitoring Plan (see Attachment 1) pursuant to state CEQA Guidelines § 15091, 15093, and 15097, respectively, regarding adverse environmental impacts from implementing of all the Proposed Fleet Vehicle Rules and Related Rule Amendments that cannot be mitigated to insignificance; and

**WHEREAS**, the Governing Board has determined that the socioeconomic impact assessment and staff report of the Proposed Fleet Vehicle Rules, including Proposed Rule 1196, is consistent with the Governing Board March 17, 1989 and October 14, 1994 resolutions and the provisions of Health and Safety Code Sections 40440.8, 40728.5 and 40920.6; and

**WHEREAS**, the Governing Board has reviewed and considered the staff's findings related to cost and employment impacts of Proposed Fleet Vehicle Rules, including Proposed Rule 1196 – Clean On-Road Heavy-Duty Public Fleet Vehicles, as set forth in the socioeconomic impact assessment, and hereby finds and determines that cost and employment impacts are as set forth in that assessment; and

**WHEREAS**, the Governing Board has determined that Proposed Fleet Vehicle Rules, including Proposed Rule 1196 – Clean On-Road Heavy-Duty Public Fleet Vehicles, are not short-term control measures in the amended 1997 Air Quality Management Plan (AQMP) in 1999 and thus, were not ranked by cost-effectiveness relative to other AQMP control measures in the amended

1997 AQMP and further that cost-effectiveness in terms of dollars per ton of pollutant reduced is not applicable to rules regulating toxic air contaminants. This, however, does not imply that cost considerations are not applicable in development of toxic rules; and

**WHEREAS**, the Governing Board has actively considered the socioeconomic impact analysis and made a good faith effort to minimize any socioeconomic impacts; and

**WHEREAS**, the Governing Board obtains its authority to adopt, amend, or repeal rules and regulations from Sections 39002, 39650 et. seq., 40000, 40001, 40440, 40441, 40463, 40702, 40725 through 40728, 41508, 41700, 41706, 42300, and 44390 through 44394 of the California Health and Safety Code; and

**WHEREAS**, the Governing Board is given specific authority relative to public and commercial fleet vehicles under Sections 40919(a)(4) and 40447.5(a) of the California Health and Safety Code; and

**WHEREAS**, the Governing Board has determined that a need exists to adopt Proposed Rule 1196 – Clean On-Road Heavy-Duty Public Fleet Vehicles to reduce public health exposure to criteria pollutant and toxic air contaminants, to meet state and federal ambient air quality standards, to meet the intent of the Board's Environmental Justice Initiatives, and to clarify the intent and implementation of Rule 1196 requirements; and

**WHEREAS**, the Governing Board has determined that Proposed Rule 1196 – Clean On-Road Heavy-Duty Public Fleet Vehicles, as proposed, is written or displayed



so that its meaning can be easily understood by the persons directly affected by the proposed rule; and

**WHEREAS**, the Governing Board has determined that Proposed Rule 1196 – Clean On-Road Heavy-Duty Public Fleet Vehicles, as proposed, is in harmony with, and not in conflict with or contradictory to, existing federal or state statutes, court decisions, or regulations; and

**WHEREAS**, the Governing Board has determined that Proposed Rule 1196 – Clean On-Road Heavy-Duty Public Fleet Vehicles, as proposed, does not impose the same requirements as any existing state or federal regulation, and the proposed rules are necessary and proper to execute the powers and duties granted to, and imposed upon, the District; and

**WHEREAS**, the Governing Board has determined that Proposed Rule 1196 – Clean On-Road Heavy-Duty Public Fleet Vehicles, as proposed, references the following statutes which the AQMD hereby implements, interprets or makes specific: H&S Code Sections 40001 (rules to achieve ambient air quality standards), 40440(a) (rules to carry out AQMP), and 40447.5(a) (rules to require fleets of 15 or more vehicles operating substantially in the AQMD to purchase vehicles powered by methanol or other equivalently clean burning alternative fuel when adding or replacing vehicles), and 40919(a)(4) (requires a significant number of low-emission vehicles in fleets); and

**WHEREAS**, a public hearing has been properly noticed in accordance with the provisions of Health and Safety Code Section 40725; and

**WHEREAS**, the Governing Board has held a public hearing in accordance with all provisions of law; and

**WHEREAS**, the Governing Board finds and determines, taking into consideration the factors in Section (d)(4)(D) of the Governing Board Procedures, that the modifications adopted which have been made to the proposed rule since notice of public hearing was published do not significantly change the meaning of the proposed rule within the meaning of Health and Safety Code Section 40726 and would not constitute significant new information pursuant to CEQA; and

**WHEREAS**, the AQMD specifies the Deputy Executive Officer of Planning, Rule Development and Area Sources as the custodian of the Rule 1196 documents or other materials which constitute the record of proceedings upon which the adoption of this proposed rule is based, which are located at the South Coast Air Quality Management District, 21865 E. Copley Drive, Diamond Bar, California; and

**WHEREAS**, the Governing Board has found that there is a problem that Propose [sic] Rule 1196 will help alleviate, namely continued exceedances of state and federal ambient air quality standards, and that this rule will promote the attainment of these standards; and

**WHEREAS**, the Governing Board finds and determines that the requirements of this rule are, in the aggregate, at least as protective of public health and welfare as applicable federal standards; and

**WHEREAS**, concerns have been raised regarding the availability of sufficient supply of alternative fuel during emergency situations; and

**WHEREAS**, the Governing Board has determined there is a need for staff to provide monitoring and implementation



updates on progress and issues related to Rule 1196 to the Governing Board.

**WHEREAS**, a need exists to have staff resources identified to assist affected parties in implementing on-road fleet vehicle rules and the Governing Board has directed staff to create a "Fleet Rule Implementation Officer" position in the AQMD FY 2000-01 Fiscal Year Budget at its June 16, 2000 meeting; and

**NOW THEREFORE, BE IT RESOLVED**, that the Governing Board hereby approves the finding, pursuant to the authority granted by law, that the potential adverse environmental effects from adopting Rule 1196 – Clean On-Road Heavy-Duty Public Fleet Vehicles, are within the scope of the previously prepared and certified Final Program Environmental Assessment for the Proposed Fleet Vehicle Rules (certified June 16, 2000) and that no new environmental documents are required pursuant to CEQA Guidelines § 15168(c)(5).

**BE IT FURTHER RESOLVED**, that the Final Program Environmental Assessment for the Proposed Fleet Vehicle Rules was presented to this Board on June 16, 2000, which is the decisionmaking body of the lead agency, and that this Board reviewed and considered the information contained in this document prior to approving this project.

**BE IT FURTHER RESOLVED**, that the Governing Board hereby adopts the Statement of Findings and Statement of Overriding Considerations pursuant to state CEQA Guidelines §§ 15091 and 15093, respectively, regarding adverse environmental impacts that cannot be mitigated to insignificance; and adopts the Mitigation Monitoring Plan pursuant to CEQA Guidelines § 15097;

which are included in Attachment 1 – Statement of Findings, Statement of Overriding Considerations, and Mitigation Monitoring Plan, attached and incorporated herein by reference.

**BE IT FURTHER RESOLVED**, that the Governing Board does hereby approve the socioeconomic impact assessment for Rule 1196 – Clean On-Road Heavy-Duty Public Fleet vehicles.

**BE IT FURTHER RESOLVED**, that the Governing Board does hereby direct staff to notify the Governing Board of any changes in state or federal law that may expand or clarify the authority of the AQMD to pursue a fuel neutral fleet rule policy and other policy changes as adopted, and to recommend revisions to the rule to be consistent with state or federal statutory requirements.

**BE IT FURTHER RESOLVED**, that the Governing Board does hereby direct staff to return to the Governing Board with proposed amendments to Rule 1196 to allow an exemption for the purchase of a conventionally fueled heavy-duty vehicle where the engine and control device have been approved by CARB to meet certification emission levels which achieve at least a 54 percent reduction in nitrogen oxide and a 71 percent reduction in particulate matter exhaust emissions from the currently available conventionally fueled engine (family) certification emission levels approved by CARB (as of the date of adoption of this rule); and which achieves a reduction in toxic risk equivalent to the level which would be achieved, on average, by currently available alternative fueled engines certified by CARB. Equivalent toxic risk shall be calculated based upon unit risk factors as approved by the California Office of Environmental Health Hazard Assessment (OEHHA).



Procedures for calculating the toxic risk reduction shall be based in accordance to direction to staff in the Adopting Resolution Nos. 00-19 and 00-20 for Rules 1192 and 1193 (adopted June 16, 2000), respectively. Staff shall propose such rule amendments within 90 days of receipt of sufficient technical information establishing that the above criteria have been satisfied.

The Governing Board also directs staff to periodically review the above guidance relative to technology advancement including advancements in the development of other technologies such as grid-based electric hybrid vehicles and to report back to the Governing Board at such time as changes may be appropriate.

**BE IT FURTHER RESOLVED**, that the Governing Board does hereby direct staff to develop the "Technical Infeasibility Certification" application form for Rule 1196 no later than six months from the date of adoption of Rule 1196. As part of the development of the application form, staff shall consider approaches to streamline the process such as a "pre-bid" process or posting previously approved technical infeasibility certifications. In addition, staff shall evaluate appropriate fees that would be assessed for processing a Technical Infeasibility Certification application and make recommendations to amend Regulation III along with the AQMD Fiscal Year 2001-02 Budget, scheduled for May 2001.

**BE IT FURTHER RESOLVED**, that the Governing Board does hereby direct staff to monitor the financial incentive programs needed to offset the additional purchase costs of a Rule 1196 compliant heavy-duty vehicle. Staff shall provide a report on a quarterly basis to the Governing Board Mobile Source Committee on the status

of the funding programs, the use of funds from the programs towards compliance with Rule 1196, and potential shortfalls in funding levels, if any. In addition, staff may make recommendations to amend Rule 1196 as necessary to reflect the findings of the quarterly reports.

**BE IT FURTHER RESOLVED**, that the Governing Board does hereby direct staff to monitor the development of the alternative-fuel refueling infrastructure to determine if the future infrastructure network would be adequate to provide fuel for rule compliant vehicles and during emergency situations. One year prior to Rule 1196 implementation and every six months thereafter, staff shall provide reports to the Governing Board Mobile Source Committee on the status of the alternative-fuel refueling infrastructure development. In addition, staff may make recommendations to amend Rule 1196 as necessary to reflect the findings of the reports.

**BE IT FURTHER RESOLVED**, based on the findings in the progress reports described above, staff may recommend modifications to the rule requirements for the Governing Board's consideration.

**BE IT FURTHER RESOLVED**, that the Governing Board does hereby direct staff to provide a status report on Rule 1196 and other fleet rules, back to the Governing Board within six month with an examination of implementation issues, legal actions, legislation, related actions by CARB and U.S. EPA, and possible expansion of the rule to other fleets. This paragraph is not intended to restrict in any way the Governing Board's authority to adopt or amend fleet vehicle regulations or represent a moratorium on AQMD fleet vehicle rulemaking.



**BE IT FURTHER RESOLVED**, that the Governing Board does hereby direct staff to convene a Working Group with the California Trucking Association, California Independent Oil Marketers Association, and other interested parties concerning inter-regional competitiveness issues pertaining to private sector petroleum/fuel delivery trucks and to report back to the Governing Board on the results of such discussions prior to initiating any amendments to Rule 1196 or creation of a new rule that would include such vehicles.

**BE IT FURTHER RESOLVED**, that the Governing Board does hereby direct staff to provide to the Governing Board at its next meeting, a schedule for either amendment proposals to Rule 1196 or new rule proposals that would expand Rule 1196 implementation to private utilities and fuel providers. The schedule may be provided as part of the Rule Forecast Report to the Governing Board.

**BE IT FURTHER RESOLVED**, that the Governing Board does hereby direct staff to monitor those local jurisdictions that provide public services such as street maintenance or landscape services to determine if implementation of Rule 1196 would cause local jurisdictions to reduce or eliminate such services since Rule 1196 does not apply to private entities that compete for local jurisdiction services. Staff shall conduct a survey and complete it no later than six month prior to Rule 1196 implementation, of historical local jurisdiction public service contracting activities and potential future public service contracting levels as part of this effort. Staff shall report its findings and any recommendations to the Governing Board Mobile Source Committee.

**BE IT FURTHER RESOLVED**, that the Governing Board does hereby adopt, pursuant to the authority granted by law, Proposed Rule 1196 – Clean On-Road Heavy-Duty Public Fleet Vehicles, as set forth in the attached and incorporated herein by reference.

**BE IT FURTHER RESOLVED**, that the Governing Board does hereby direct staff to convene a public meeting to discuss the assumptions used in the risk-weighted emission calculations for heavy-duty gasoline engines within 120 days and to report to the Governing Board Mobile Source Committee on issues and comments regarding the calculations and may make recommendations on any potential amendments to Rule 1196 relative to allowance of gasoline-powered vehicles. In addition, staff shall consider as part of the calculations any new hydrocarbon speciation profiles for alternative-fueled engines that may become available within the 120 day period.

**BE IT FURTHER RESOLVED**, that the Governing Board does hereby direct staff to work with the City of Los Angeles and other parties affected by Rule 1196 to identify and secure additional funding sources. In addition, staff shall work with CARB to investigate the authority to collect regional fees, such as the automobile registration surcharge fee, that could be used to help offset the costs of compliance with Rule 1196 and other fleet vehicle rules. A report shall be prepared on whether such authority exists and, if so, how it could be exercised for this purpose.

Attachment

AYES: Antonovich, Bernson, Burke, Carney, Coad, Glover, LaPisto-Kirtley, Loveridge, Mikels, Paulitz, Verdugo-Peralta and Wilson



NOES: None

ABSENT: None

DATE: October 20, 2000

/s/ Jackie Dix
Clerk of the District Board

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**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

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| ENGINE MANUFACTURERS ASSOCIATION,<br><br>Plaintiff,<br><br>v.<br><br>SOUTHCOAST AIR QUALITY MANAGEMENT DISTRICT ("SCAQMD"), et al.,<br><br>Defendants. | Case No. 00-09065 FMC (BQRX)<br><br>PLAINTIFF ENGINE MANUFACTURERS ASSOCIATION'S STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW; [PROPOSED JUDGMENT]<br><br>Date: May 21, 2001<br>Time: 10:00 a.m.<br>Courtroom: 750<br><br>Honorable Florence-Marie Cooper United States District Judge |
| NATURAL RESOURCES DEFENSE COUNCIL, INC., COALITION FOR CLEAN AIR, INC., COMMUNITIES FOR A BETTER ENVIRONMENT, INC., | |



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| PLANNING AND CONSERVATION LEAGUE, and SIERRA CLUB,<br><br>Intervenors. | |
| WESTERN STATES PETROLEUM ASSOCIATION,<br><br>Intervenor. | |

Plaintiff ENGINE MANUFACTURERS ASSOCIATION ("EMA"), by and through its attorneys, and pursuant to Local Rule 7.14.1, hereby submits this Statement of Uncontroverted Facts and Conclusions of Law in support of EMA's Motion for Summary Judgment.

## Uncontroverted Material Facts

EMA contends that there is no genuine issue with respect to any of the following material facts:

### A. Background Facts

1. This case centers on six regulations (Rules 1191-1194, 1186.1 and 1196) relating to the control of emissions from certain fleets of motor vehicles operating within the South Coast Air Basin. These regulations are generally referred to as the "SCAQMD Fleet Rules." The South Coast Air Quality Management District ("SCAQMD"), acting through its Board members and executive officer (collectively, the "SCAQMD Defendants") adopted the SCAQMD Fleet Rules pursuant to Board hearings held on June 16, 2000, August 18, 2000, and October 20, 2000. (Complaint and Answer, ¶¶ 1, 47.)

2. Defendant SCAQMD is the air quality management district established under the California Health and Safety Code to develop and implement a strategy for achieving and maintaining ambient air quality standards within the South Coast Air Basin. Agents of the SCAQMD, including the SCAQMD Defendants, are responsible for administering the Fleet Rules at issue. (Complaint and Answer, ¶ 14.)

3. EMA is the not-for-profit trade association that represents the leading manufacturers of internal combustion engines used in truck and bus applications. One of EMA's principal purposes is to represent the interests of its member companies in regulatory proceedings, and, where necessary, to challenge rulemaking activities that are in violation of the underlying statutes. Since the SCAQMD Fleet Rules will prohibit or limit the purchase (and, therefore, sale) of EMA's members' diesel-fueled engine products, EMA's members are subject to and will be adversely affected by the SCAQMD Fleet Rules. (Declaration of Jed Mandel; Ex. 1 to EMA's Supporting Memorandum.)

4. EMA has initiated this action for a declaratory judgment that the SCAQMD Fleet Rules are preempted and void under the federal Clean Air Act ("CAA"), and for injunctive relief against any efforts to enforce the SCAQMD Fleet Rules.

5. The U.S. Environmental Protection Agency ("EPA") and the State of California, acting through its Air Resources Board ("ARB"), have the authority to regulate mobile sources of air pollution (*i.e.* motor vehicles and motor vehicle engines), and are doing so in a comprehensive manner through a series of emission control regulations.



Other states and political subdivisions, however, are preempted under Section 209(a) of the CAA from "adopting or attempting to enforce *any standard relating to* the *control of emissions*" from new motor vehicles or motor vehicle engines. 42 U.S.C. § 7543(a) (Emphasis added.) Section 177 of the CAA sets forth additional express preemption provisions. *See* 42 U.S.C. § 7507.

6. More specifically, Section 209(a) of the CAA provides, as follows:

(a) *Prohibition*

> No state or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State [or political subdivision thereof] shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment. 42 U.S.C. §7543(a).

7. Section 177 of the CAA provides in relevant part, as follows:

> Nothing in this section or in subchapter II of this chapter shall be construed as authorizing any such State to prohibit or limit, directly or indirectly, the manufacture or sale of a new motor vehicle or motor vehicle engine that is certified in California as meeting California standards, or to take any action of any kind to create, or have the effect of creating, a motor vehicle or motor vehicle engine different than a motor vehicle or engine

certified in California under California standards (a "third vehicle") or otherwise create such a "third vehicle." 42 U.S.C. §7507.

8. When Congress enacts legislation, it may lawfully prohibit parallel state legislation and occupy or preempt a particular field. (Complaint and Answer, ¶¶ 83, 90, 97, 104, 111, 118.)

9. One of Congress' express purposes in enacting Sections 209(a) and 177 of the CAA was to protect manufacturers of motor vehicles and motor vehicle engines from a myriad of potentially inconsistent and burdensome state and local emission-control standards for new motor vehicles and new motor vehicle engines. (Complaint and Answer, ¶ 6.)

10. Over the past several years, EPA, and the CARB have adopted similar emission control requirements for new heavy-duty on-highway diesel-fueled motor vehicles and engines. These include current NOx and PM standards of 4.0 g/bhp-hr and 0.1 g/bhp-hr (0.05 g/bhp-hr for urban buses), respectively, and, starting in 2004, a NOx + NMHC standard of 2.4 g/bhp-hr and a PM standard of 0.10 g/bhp-hr (0.05 g/bhp-hr for urban buses). (Complaint and Answer, ¶¶ 34-35.)

11. The ARB also has enacted separate, more stringent emission control programs for motor vehicles, including one for light and medium-duty vehicles, including certain diesel-fueled vehicles (the "LEV Program"), and one for heavy-duty urban transit buses (the "Urban Bus Program"). (Complaint and Answer, ¶ 38.)

12. The LEV Program requires manufacturers to produce and deliver for sale vehicles or engines certified to



various emission-based categories. The LEV Program achieves emission reductions by requiring manufacturers to sell progressively cleaner mixes of vehicles over time. (Complaint and Answer, ¶ 39.)

13. In the medium-duty vehicle category, which includes certain diesel-fueled pickup trucks, vans and large SUVs, the LEV Program achieves emissions reductions by requiring all vehicles to be certified to more stringent emission categories in specified model years (*i.e.* LEV standards in 2002, and ULEV standards in 2004). Medium-duty vehicle manufacturers also have the flexibility to balance the sale of higher emitting vehicles (*e.g.* vehicles certified to Tier 1 levels) with vehicles certified to more stringent emission requirements (*e.g.* vehicles certified to ULEV levels). (Complaint and Answer, ¶ 41.)

14. With respect to new medium-duty diesel-fueled motor vehicle engines, the LEV Program, in essence, allows for the sale of those engine products through the 2002-2004 timeframe when the LEV and ULEV requirements take effect. Consequently, new diesel-fueled medium-duty motor vehicle engines can be sold and purchased under the ARB's LEV Program for at least the next several years. (Complaint and Answer, ¶ 42.) (SR1191-17.)

15. On February 24, 2000, the ARB adopted its Urban Bus Program. To implement this ARB regulation, urban transit bus fleet operators are required to choose between two different compliance paths – a "diesel path" or an "alternative-fuel path." Fleet operators were required to make this choice and notify ARB of their decision by January 31, 2001. (Complaint and Answer, ¶ 43.)

16. The ARB Urban Bus Program specifically permits the purchase and sale of diesel-fueled transit buses, both currently and into the future. (Complaint and Answer, ¶ 45.)

17. With respect to all other new heavy-duty on-highway diesel-fueled motor vehicles and engines (other than new urban transit buses), the governing emission control requirements, both nationally and in California, are those as described in paragraph 34 of EMA's Amended Complaint (and in paragraph 10 above). Consequently, and as long as any medium-duty or heavy-duty on-highway diesel-fueled motor vehicle engine meets those specified emission requirements, it can be purchased and sold in California, both currently and into the future. (Complaint and Answer, ¶ 46.)

18. The SCAQMD Defendants have relied on California Health and Safety Code section 40447.5 in crafting and adopting the SCAQMD Fleet Rules. Health and Safety Code section 40447.5 was enacted in 1987, three years prior to the 1990 amendments to the CAA that added the specific "third vehicle" prohibitions to CAA Section 177. (Complaint and Answer, ¶ 71.)

## B. Rule 1191

19. Rule 1191, entitled "Clean On-Road Light-and Medium-Duty Public Fleet Vehicles," was adopted on June 16, 2000. A copy of Rule 1191 is appended hereto as Exhibit "A."

20. The stated purpose of Rule 1191 (as set forth in paragraph (a) of the Rule) is to require passenger car, light-duty truck, or medium-duty vehicle fleet operators to



acquire low-emitting gasoline and alternative-fuel vehicles *to reduce air toxic and criteria pollutant emissions* when procuring or leasing these vehicles in the District." (Rule 1191(a); emphasis added.)

21. Paragraph (c)(1) of Rule 1191 defines "alternative-fueled vehicle" to mean "*a vehicle or engine that is not powered* by gasoline or *diesel fuel* and emits hydrocarbon, carbon monoxide, or nitrogen oxides, on an individual basis at least equivalent to or lower than a ULEV based on ARB's certification data." (1191(c)(1); emphasis added.)

22. Paragraph (d) of Rule 1191 provides that "[u]pon adoption of this rule and every six months thereafter, the Executive Officer shall publish a list of engines and associated vehicle models certified by California Air Resources Board (CARB) that fleet operators can choose from to comply with paragraph (e) of this Rule." (Rule 1191(d).)

23. Paragraph (e)(1) of Rule 1191 provides that "[b]eginning July 1, 2001, public fleet operators of 15 or more vehicles shall procure from the list published by the Executive Officer as required under paragraph (d), or otherwise certified by CARB as equivalent low-emitting gasoline or alternative-fuel vehicles, when adding or replacing vehicles to their vehicle fleet." (Rule 1191(e)(1).)

24. A copy of the final SCAQMD Staff Report for Rule 1191 is appended hereto as Exhibit "B." The Staff Report explains the purpose of Rule 1191, as follows:

> This proposed rule is being developed in an effort to reduce public exposure to motor vehicle pollution, including both toxic and ozone precursor emissions. It is intended that these benefits be surplus to existing state and federal relations

governing emission levels from on-road motor vehicles. (SR 1191-1.)

* * *

One of the objectives of the proposed rule is to require the purchase of the cleanest vehicles for fleets, taking advantage of the varying levels of emission control relative to the wide array of vehicles being produced for compliance with the [ARB's] LEV regulation. (SR 1191-4.)

* * *

The primary air quality objective of Proposed Rule 1191 is to reduce air emissions and toxic risk levels within the SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT . . . [*Diesel-fueled vehicles would not be considered "low-emission vehicles."* (SR 1191-6; emphasis added.)

25. The Staff Report for Rule 1191 confirms that the purchase and sale of certain ARB-certified vehicles and engines will be prohibited or limited under the Rule. Specifically, the Staff Report states,

Over time, the ARB low-emission vehicle [LEV] regulation will require the mix of vehicles sold by manufacturers to become cleaner as a result of compliance with fleet average hydrocarbon standards. By requiring the acquisition of ARB-certified low-emission vehicles or cleaner when public fleets add or replace vehicles, *the purchase of* higher polluting [ARB-certified] *Tier 1 and transitional-low-emission vehicles* [TLEVs] *will be prevented.*

* * *

For certain types of specialty medium-duty vehicles (engine-certified [and diesel-fueled]),



ARB's LEV regulation may not require manufacturers to sell sufficient amounts of vehicles or models prior to [July 1, 2001] to satisfy fleet operational needs and still comply with PR 1191 purchase requirements.

* * *

[T]here still may be a model availability issue since fleet operators are indicating that there are potentially many specialty diesel-powered medium-duty vehicles where the availability of corresponding gasoline or alternative fuel vehicles is uncertain. (Note that *PR 1191 only allows compliant gasoline or alternative-fueled vehicles to be purchased.*) (SR 1191-7, 8; emphasis added.)

* * *

The ARB LEV regulations allow manufacturers to produce [and sell] vehicles that emit at higher levels than low-emission vehicles, including vehicles certified to Tier I and transitional-low-emission vehicle standards, through the year 2002. To the extent that *the proposed rule limits the purchase of these vehicles*, there will be an emission benefit from the LEV or cleaner purchase requirement. (SR 1191-17; emphasis added.)

* * *

*Diesel powered vehicles are not allowed*, unless the vehicle purchase qualifies for an exemption. (SR 1191-9; emphasis added.)

26. Attachment 4 to the Rule 1191 Staff Report is entitled, "ARB-Certified Engines/Vehicles Not Qualifying Under Proposed Rule 1191(e)." Among the ARB-certified (but non-qualifying) vehicles and engines included on

Attachment 4 are numerous medium-duty diesel-fueled vehicles.

27. The purpose of Rule 1191 is to effect a general quantitative reduction in emissions from fleets of light and medium duty vehicles and engines operating in the District.

28. Rule 1191 establishes emissions-related requirements as conditions precedent to the initial purchase and sale of certain new motor vehicles or motor vehicle engines.

29. Rule 1191 prohibits or limits, directly or indirectly, the purchase and sale of certain new motor vehicles or motor vehicle engines (*i.e.* Tier 1 and TLEV vehicles and engines) that are certified in California as meeting California standards.

## C. Rule 1192

30. Rule 1192, entitled "Clean On-Road Transit Buses," was adopted on June 16, 2000. A copy of Rule 1192 is appended hereto as Exhibit "C."

31. The stated purpose of Rule 1192 (as set forth in paragraph (a) of the Rule) is to "require public transit fleet operators to acquire alternative-fuel heavy-duty vehicles when procuring or leasing these vehicles *to reduce air toxic and criteria pollutant emissions.*" (Rule 1192(a); emphasis added.)

32. Paragraph (c)(1) of Rule 1192 defines "alternative-fuel heavy-duty vehicle" to mean "a heavy-duty vehicle, urban bus or engine that uses compressed or liquefied natural gas, propane, methanol, electricity, fuel



cells, or other advanced *technologies* that do *not rely on diesel fuel* . . . " (Rule 1192(c)(1); emphasis added.)

33. Paragraph (d) of Rule 1192 provides that "[u]pon adoption of this rule [or in certain cases, beginning July 1, 2001], . . . all new transit vehicle or urban bus purchases or leases must be alternative-fuel heavy-duty vehicles when adding or replacing buses to their fleets." (Rule 1192(d).)

34. A copy of the final SCAQMD Staff Report for Rule 1192 is appended hereto as Exhibit "D." The Staff Report explains the purpose of Rule 1192, as follows:

> This proposed rule is being developed in an effort to reduce public exposure to transit bus emissions. It is intended that these benefits be surplus to existing state and federal regulations governing emission levels from on-road motor vehicles. (SR 1192-1.)
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> * * *
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> Proposed Rule 1192 is one of a series of rules being proposed that affect vehicle fleet operations in the District. The AQMD's objective is to promote the use of less-polluting vehicles to reduce criteria pollutant and toxic emissions. (SR 1192-2.)
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> * * *
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> The goal of the proposed fleet rule is to help ensure that emission reductions are achieved from transit bus operations. (SR 1192-11.)

35. The Staff Report for Rule 1192 confirms that the purchase and sale of ARB-certified "diesel path" transit

buses will be prohibited or limited under the Rule. Specifically, the Staff Report states,

> The vehicle purchase provisions require affected fleets to purchase buses powered by alternative fuels. . . . The definition of an alternative-fuel heavy-duty vehicle is . . . advanced *technologies that do not rely on diesel fuel*. (SR 1192-7, 8; emphasis added.)
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> The effect of PR 1192, therefore, will be to basically require affected fleet operators to choose the alternative fuel path. (SR 1192-11.)
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> * * *
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> Proposed Rule 1192 requires public agency fleets and private fleets under contract to government agencies to purchase transit vehicles powered by alternative fuels. . . . Although *diesel transit bus purchases would be prohibited*, vehicles powered by natural gas, for example, have been commercially available and used in fleets located in the AQMD since the early 1990s. (SR 1192-20; emphasis added.)

36. The purpose of Rule 1192 is to effect a general quantitative reduction in emissions from heavy-duty urban transit buses operating in the District.

37. Rule 1192 establishes emissions-related requirements as conditions precedent to the initial purchase and sale of certain new motor vehicles or motor vehicle engines.

38. Rule 1192 prohibits or limits, directly or indirectly, the purchase and sale of certain new motor vehicles and motor vehicle engines (*i.e.* "diesel path" urban transit



buses) that are certified in California as meeting California standards.

## D. Rule 1193

39. Rule 1193, entitled "Clean On-Road Residential and Commercial Refuse Collection Vehicles," was adopted on June 16, 2000. A copy of Rule 1193 is appended hereto as Exhibit "E."

40. The stated purpose of Rule 1193 (as set forth in paragraph (a) of the Rule) is to "require public and private solid waste collection fleet operators to acquire alternative-fuel refuse collection heavy-duty vehicles when procuring or leasing these vehicles *to reduce air toxic and criteria pollutant emissions*." (Rule 1193(a); emphasis added.)

41. Paragraph (c)(1) of Rule 1193 defines "alternative-fuel heavy-duty vehicle" to mean "a heavy-duty vehicle or engine that uses compressed or liquefied natural gas, liquefied petroleum gas, methanol, electricity, fuel cells, or other advanced *technologies that do not rely on diesel fuel*." (Rule 1193(c)(1); emphasis added.)

42. Paragraph (d)(1) of Rule 1193 provides that, with certain limited exceptions, "[b]eginning July, 2001 [or July 1, 2002 for smaller fleets], . . . all additions to an existing fleet, or formation of a new fleet, of solid waste collection vehicles shall be by purchase or lease of: (A) alternative-fuel heavy-duty vehicles when adding or replacing solid waste collection vehicles to their vehicle fleets . . . " Similar requirements are imposed with respect to fleets of "transfer or rolloff vehicles." (Rule 1193(d).)

43. A copy of the final SCAQMD Staff Report for Rule 1193 is appended hereto as Exhibit "F." The Staff Report explains the purpose of Rule 1193, as follows:

> This proposed rule is being developed in an effort to reduce public exposure to air pollution emitted from refuse collection vehicles, including toxic particulates, and ozone precursor emissions. (SR 1193-1.)
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> * * *
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> Refuse collection vehicles are covered in this proposed rule as part of an overall effort by the AQMD to reduce toxic, particulate, and ozone precursor emissions from public and private fleets operation [sic] in the AQMD. (SR 1193-1.)
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> The purpose of PR 1193 is to reduce criteria pollutants (NOx) and toxic (PM) emissions from municipal solid waste collection operations in the District. (SR 1193-6.)
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> The goal of the proposed fleet rule is to reduce PM and NOx emissions through the introduction and use of cleaner-burning vehicles. (SR 1193-8.)

44. The Staff Report for Rule 1193 confirms that the purchase and sale of certain ARB-certified diesel-fueled vehicles and engines will be prohibited or limited under the Rule. Specifically, the Staff Report states,

> In an effort to facilitate the *transition from diesel to dedicated natural gas operation*, PR 1193 allows compression ignited dual-fuel technology for a limited time (prior to July 1, 2002)



> for purchases of solid waste collection vehicles. (SR 1193-6; emphasis added.)
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> * * *
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> Permitted alternative fuels include compressed or liquefied natural gas, propane, methanol, electricity, fuel cells or other advanced *technologies that do not rely on diesel fuel*. (SR 1193-7; emphasis added.)
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> The emission benefits for PR 1193 are based on refuse truck fleets purchasing alternative-fueled refuse trucks *instead of diesel refuse trucks*. (SR 1193-8.)
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> The purpose of PR 1193 is to produce air quality benefits utilizing current alternative fuel heavy-duty engine technology for refuse truck applications. *This may require certain engine manufacturers to further develop their engine technologies* to the extent that refuse truck fleets affected by the proposed rule will be able to utilize their technology subsequent to rule implementation. (SR 1193-27; emphasis added.)

45. The purpose of Rule 1193 is to effect a general quantitative reduction in emissions from heavy-duty waste collection vehicles operating in the District.

46. Rule 1193 establishes emissions-related requirements as conditions precedent to the initial purchase and sale of certain new motor vehicles or motor vehicle engines.

47. Rule 1193 prohibits or limits, directly or indirectly, the purchase and sale of certain new motor vehicles

and motor vehicle engines (*i.e.* heavy-duty diesel-fueled waste collection vehicles) that are certified in California as meeting California standards.

## E. Rule 1194

48. Rule 1194, entitled "Commercial Airport Ground Access," was adopted on August 18, 2000, and amended on October 20, 2000. A copy of Rule 1194 is appended hereto as Exhibit "G."

49. The stated purpose of Rule 1194 (as set forth in paragraph (a) of the Rule) is to "require passenger car, light-duty truck, medium-duty transit vehicle, and heavy-duty transit vehicle fleet operators to acquire cleaner burning or alternative-fueled vehicles *to reduce air toxic and criteria pollutant emissions* when procuring or leasing these vehicles in the District unless otherwise exempt." (Rule 1194(a); emphasis added.)

50. Paragraph (c)(2) of Rule 1194 defines "alternative-fueled vehicle" to mean "a light-or medium-duty vehicle, or heavy-duty transit vehicle or engine *that is not powered* by gasoline or *diesel fuel*." (Rule 1194(c)(2); emphasis added.)

51. Paragraph (d) of Rule 1194 generally provides that, beginning either July 1, 2001 or July 1, 2002, for airport fleet operators providing limousine or transit shuttle services to the public in and out of commercial airports terminals: (1) all new purchases or leases of passenger cars or medium-duty vehicles may not include ARB-certified Tier 1, TLEV or LEV vehicles when adding or replacing a passenger car or medium-duty vehicle to their fleets; and (2) all new heavy-duty transit vehicle



purchases or leases shall be alternative-fueled vehicles (not diesel-fueled vehicles) when adding or replacing transit vehicles to their vehicle fleets (Rule 1194(d).)

52. A copy of the final SCAQMD Staff Report for Rule 1194 is appended hereto as Exhibit "H." The Staff Report explains the purpose of Rule 1194, as follows:

> Proposed Rule 1194 (PR 1194) specifies that passenger transportation services at commercial airport terminals begin purchasing cleaner burning vehicles beginning July 1, 2001 when adding or replacing vehicles in their fleets. *These emission reductions would be in excess of the current federal and state requirements.* ... PR 1194 compliant vehicles meet a lower certified mass emissions exhaust standards than would normally be required ... These benefits would be *surplus to existing state and federal regulations governing emission levels from on-road motor vehicles.* (SR 1194-1; emphasis added.)
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> * * *
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> PR 1194 will achieve *emission reductions* specifically associated with commercial airport operations. ... The primary air quality objective of PR 1194 is *to reduce air emissions* and toxic risk levels within the AQMD. (SR 1194-4; emphasis added.)

53. The Staff Report for Rule 1194 confirms that the purchase and sale of certain ARB-certified vehicles and engines will be prohibited or limited under the Rule. Specifically, the Staff Report states,

> PR 1194 requires the acquisition of vehicles that have been certified to ARBs ULEV or cleaner standard [not Tier 1, TLEVs or LEVs] for

light- and medium-duty vehicles, and alternative fueled [not diesel-fueled] heavy-duty vehicles if these vehicles are authorized to pick up passengers at commercial airports . . . New purchases of heavy-duty fleet vehicles that pick-up passengers at the airport and transport them to parking lots, hotels/motels and new transit vehicle purchases, leases and operations contracts, *shall be ARB certified alternative fuel vehicles*. In order to implement these fleet acquisition requirements, as part of Rule 1194 the AQMD will publish a list of light- and medium-duty vehicle/engine models that meet ULEV or cleaner standards. It is intended that fleet managers will simply choose vehicles form this list for rule compliance purposes . . . (SR 1194-18; emphasis added.)

* * *

The proposed fleet rule is specifically based on achieving emission reductions *beyond the ARB Low Emission Vehicle regulation*. Emission reductions of the proposed fleet rule will be the result of affected vehicle fleets purchasing a cleaner mix of vehicles than they would have otherwise purchased. (SR 1194-19; emphasis added.)

* * *

It is assumed that *all replaced heavy-duty vehicles* and light-duty taxicabs *will be alternative fuel powered*. . . . [T]he only large sized light-duty vehicles certified to the ULEV emission standard are alternative fueled vehicles. (SR 1194-30; emphasis added.)

54. The purpose of Rule 1194 is to effect a general quantitative reduction in emissions from fleets of light,



medium, and heavy-duty vehicles and engines operating in the District.

55. Rule 1194 establishes emissions-related requirements as conditions precedent to the initial purchase and sale of certain new motor vehicles or motor vehicle engines.

56. Rule 1194 prohibits or limits, directly or indirectly, the purchase and sale of certain new motor vehicles or motor vehicle engines (*i.e.* Tier 1, TLEV and diesel-fueled vehicles and engines) that are certified in California as meeting California standards.

## F. Rule 1186.1

57. Rule 1186.1, entitled "Less Polluting Sweepers," was adopted on August 18, 2000. A copy of Rule 1186.1 is appended hereto as Exhibit "I."

58. The stated purpose of Rule 1186.1 (as set forth in paragraph (a) of the Rule) is to "require certain public and private sweeper fleet operators to acquire alternate-fuel or otherwise less-polluting sweepers when purchasing or leasing these vehicles for sweeping operations." (Rule 1186.1(a).)

59. Paragraph (c)(2) of Rule 1186.1 defines "alternative-fuel sweeper" to mean "a sweeper with engine(s) that use compressed or liquefied natural gas, liquefied petroleum gas (propane), methanol, electricity, or fuel cells. Hybrid-electric and dual-fuel *technologies that use diesel fuel are not considered alternative-fuel technologies* for the purposes of this rule." (Rule 1186.1(c)(2); emphasis added.)

60. Paragraph (d)(1) of Rule 1186.1 provides that beginning July 1, 2002, unless a fleet operator obtains a "Technical Infeasibility Certification" from the SCAQMD's Executive Officer, fleet operators shall purchase or lease alternative-fuel sweepers for each individual purchase or lease of any replacement or additional sweeper. (Rule 1186.1(d)(1).)

61. A copy of the final SCAQMD Staff Report for Rule 1186.1 is appended hereto as Exhibit "J." The Staff Report explains the purpose of Rule 1186.1, as follows:

> The objective of these rules is to reduce exhaust emissions from on-road vehicles and the public's exposure to air toxic contaminants and criteria pollutants. (SR 1186.1-1.)
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> * * *
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> One of the primary objectives of the proposed Clean Fleets program, including PR 1186.1, is to reduce mobile source emissions, particularly diesel particulates, by accelerating the implementation of currently available alternative-fuel vehicle technology. (SR 1186.1-3.)
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> * * *
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> The purpose of PR 1186.1 is to increase the number of alternative-fuel sweepers used by fleet operators providing sweeping services in the AQMD's jurisdiction to reduce air toxic and criteria pollutant emissions. (SR 1186.1-5.)

62. The Staff Report for Rule 1186.1 confirms that the purchase and sale of certain ARB-certified diesel-fuel vehicles and engines will be prohibited and limited under the Rule. Specifically, the Staff Report states,



> For the purposes of this rule, hybrid-electric and dual-fuel *sweepers that use diesel fuel are not considered* at this time to be powered by alternative fuels. . . . Because sweeper manufacturers must typically *remove the existing diesel engine and fuel system* that the chassis/engine manufacturers provide before they can install an alternative-fuel engine and fuel system, there is an increased incremental cost for fleet operators who purchase an alternative-fuel sweeper. (SR 1186.1-5; emphasis added.)
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> PR 1186.1 *requires that diesel street sweepers be replaced with alternative-fuel street sweepers* after July 1, 2001. (SR 1186.1-11; emphasis added.)

63. The purpose of Rule 1186.1 is to effect a general quantitative reduction in emissions from street sweeper vehicles and engines operating in the District.

64. Rule 1186.1 establishes emissions-related requirements as conditions precedent to the initial purchase and sale of certain new motor vehicles or motor vehicle engines.

65. Rule 1186.1 prohibits or limits, directly or indirectly, the purchase and sale of certain new motor vehicles and motor vehicle engines (*i.e.* diesel-fueled street sweepers) that are certified in California as meeting California standards.

## G. Rule 1196

66. Rule 1196, entitled "Clean On-Road Heavy-Duty Public Fleet Vehicles," was adopted on October 20, 2000. A copy of Rule 1196 is appended hereto as Exhibit "K."

67. The stated purpose of Rule 1196 (as set forth in paragraph (a) of the Rule) is to "require public fleet operators to acquire alternative-fuel heavy-duty vehicles when procuring or leasing these vehicles *to reduce air toxic and criteria pollutant emissions*." (Rule 1196(a); emphasis added.)

68. Paragraph (c)(1) of Rule 1196 defines "alternative-fuel heavy-duty engine or vehicle" to mean "a heavy-duty vehicle or engine that uses compressed or liquefied natural gas, propane, methanol, electricity, fuel cells, or other advanced technologies *that do not rely on diesel fuel*, and has been certified by the California Air Resources Board (CARB)." (Rule 1196(c)(1); emphasis added.)

69. Paragraph (d) of Rule 1196 provides that beginning July 1, 2002, unless a fleet operator obtains a "Technical Infeasibility Certification" from the SCAQMD's Executive Officer, all new additions to an existing fleet, or formation of a new fleet, or heavy-duty vehicles, shall be by purchase or lease of: (1) alternative-fuel heavy-duty engines or vehicles; (2) dual-fuel heavy-duty vehicles; or (3) dedicated gasoline heavy-duty vehicles. (Rule 1196(d).)

70. A copy of the final SCAQMD Staff Report for Rule 1196 is appended hereto as Exhibit "L." The Staff Report explains the purpose of Rule 1196, as follows:

> One of the primary objectives of the proposed Clean Fleet program, which includes PR 1196, is to reduce TAC emissions, primarily diesel particulate, by accelerating the implementation of



> commercially available alternative-fuel engines. (SR 1196-3).
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> * * *
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> The purpose of PR 1196 is to increase the number of alternative-fuel or gasoline heavy-duty vehicles used by fleet operators providing public services in the AQMD's jurisdiction to reduce air toxic and criteria pollutant emissions. (SR 1196-6.)
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> * * *
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> With regard to criteria pollutants, PR 1196 is specifically based on achieving *emission reductions beyond the mandatory U.S. EPA and* ARB *heavy-duty engine emission standards.* (SR 1196-12; emphasis added.)

71. The Staff Report for Rule 1196 confirms that the purchase and sale of certain ARB-certified heavy-duty vehicles and engines will be prohibited or limited under the Rule. Specifically, the Staff Report states,

> Proposed Rule (PR) 1196 – Clean On-Road Heavy-Duty Public Fleet Vehicles – . . . would require public fleet operators to purchase alternative-fuel, dual-fuel, or gasoline heavy-duty vehicles when replacing or adding vehicles to their fleets. . . . Under current PR 1196 provisions, a fleet operator may be able to purchase or lease a diesel-powered vehicle *if SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT approves a Technical Infeasibility Certification request* for that purchase. AQMD approval of a Technical Infeasibility Certification request can only be *based on a demonstration that no alternative-fuel heavy-duty vehicles are commercially*

*available* for those specific operations. (SR 1196-1; emphasis added.)

* * *

A fleet operator may purchase or lease a conventionally fueled heavy-duty vehicle with approved exhaust control devices, if the AQMD certifies that it is technically infeasible for a fleet operator to purchase or lease an alternative-fuel heavy-duty vehicle. (SR 1196-10.)

* * *

The emission benefits of PR 1196 are primarily based on public fleet operators purchasing heavy-duty alternative-fuel vehicles *instead of heavy-duty diesel vehicles*. (SR 1196-12; emphasis added.)

* * *

*Diesel powered vehicles are not allowed*, unless a Technical Infeasibility Certification Request is approved by the Executive Officer. (SR 1196-22; emphasis added.)

72. The purpose of Rule 1196 is to effect a general quantitative reduction in emissions from fleets of heavy-duty vehicles and engines operating in the District.

73. Rule 1196 establishes emissions-related requirements as conditions precedent to the initial purchase and sale of certain new motor vehicles or motor vehicle engines.

74. Rule 1196 prohibits or limits, directly or indirectly, the purchase and sale of certain new motor vehicles or motor vehicle engines (*i.e.* heavy-duty diesel-fuel vehicles



and engines) that are certified in California as meeting California standards.

## H. Governing Board Resolutions

75. The SCAQMD Governing Board Resolutions adopting Rules 1192-1194, 1186.1 and 1196 are appended hereto as Group Exhibit "M."

76. Each of these Resolutions contains the following provision:

> BE IT FURTHER RESOLVED, that the Governing Board does hereby direct staff to return to the Governing Board with proposed amendments to [the SCAQMD Fleet Rules] to allow an exemption for the purchase of a conventionally fueled vehicle where the engine and control device have been approved by CARB to meet certification emission levels which achieve at least a 54 percent reduction in nitrogen oxide and a 71 percent reduction in particulate matter exhaust emissions from the currently available conventionally fueled engine (family) certification emission levels approved by CARB (as of the date of adoption of [the Fleet Rules]); . . .

77. In addition, paragraph (e)(6) of Rule 1193 states that "[u]pon demonstration to the Executive Officer that all existing solid waste collection vehicles equipped with 1995 and subsequent model year diesel engines in the fleet, have been equipped with CARB certified particulate matter control devices that achieve 71 percent or greater reductions in particulate matter emissions, a fleet operator may purchase dual-fuel vehicles pursuant to subparagraph (d)(1)(B) until July 1, 2003." (Rule 1193(e)(6).)

78. The foregoing provisions of the Governing Board Resolutions, as well as Rule 1193(e)(6), further confirm that the SCAQMD Fleet Rules are intended to effect quantitative reductions in emission levels from fleets of motor vehicles and motor vehicle engines. These provisions also confirm that the SCAQMD Fleet Rules establish certification or other approval requirements relating to the control of emissions from new motor vehicles or new motor vehicle engines as conditions precedent to the initial purchase and sale of diesel-fueled motor vehicles and engines.

## Conclusions of Law

79. This Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it arises under the Supremacy Clause, the laws of the United States, and 42 U.S.C. § 1983. Venue is proper in this District under 28 U.S.C. § 1391(b) because the SCAQMD's headquarters are located in this District, and because the SCAQMD Fleet Rules pertain to public fleets owned and operated in this District. (Complaint and Answer, ¶¶ 11-12.)

80. Section 209(a) of the CAA prohibits the SCAQMD from adopting or attempting to enforce "any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines." Section 209(a) also prohibits the SCAQMD from requiring any type of "certification . . . or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle as condition precedent to the initial retail sale . . . of such motor vehicle, motor vehicle engine, or equipment." 42 U.S.C. §7543(a).



81. The statutory term "standard relating to the control of emissions" means a requirement the purpose of which is to effect a general quantitative reduction in emissions. *See Assoc. of Intn'l Auto. Mfrs. v. Commissioner*, 208 F.3d 1, 6-7 (1st Cir. 2000); *Amer. Auto. Mfrs. Assoc. v. Cahill*, 152 F.3d 196, 200 (2nd Cir. 1998).

82. The SCAQMD Fleet Rules constitute standards relating to the control of emissions from new motor vehicles and new motor vehicle engines.

83. The SCAQMD Fleet Rules establish certification or other approval requirements relating to the control of emissions from new motor vehicles or new motor vehicle engines as conditions precedent to the purchase and sale of such motor vehicles or engines.

84. Through their adoption and attempts to enforce the SCAQMD Fleet Rules, the SCAQMD Defendants have adopted and are attempting to enforce standards relating to the control of emissions from new motor vehicles or new motor vehicle engines, and the SCAQMD Defendants also are establishing certification of other emissions-related approval requirements as conditions precedent to the initial purchase and sale of new motor vehicles or new motor vehicle engines.

85. The SCAQMD Fleet Rules violate the provisions of Section 209(a) of the CAA, and so are preempted and invalid under controlling federal law and the Supremacy Clause of the U.S. Constitution. U.S. Const., Art. VI, cl.2.

86. Section 177 of the CAA bars the SCAQMD from prohibiting or limiting, directly or indirectly, the sale of a new motor vehicle or motor vehicle engine that is certified in California as meeting California standards. 42 U.S.C. §7507.

87. Through their adoption and attempts to enforce the SCAQMD Fleet Rules, the SCAQMD Defendants have prohibited or limited, directly or indirectly, the purchase and sale of new motor vehicles or new motor vehicle engines that are certified in California as meeting California standards.

88. The SCAQMD Fleet Rules violate the provisions of Section 177 of the CAA, and so are preempted and invalid under controlling federal law and the Supremacy Clause of the U.S. Constitution.

89. Permanent injunctive relief against any attempted enforcement of the preempted and invalid SCAQMD Fleet Rules is warranted and should be granted.

DATED: March 23, 2001

Respectfully submitted,

JED R. MANDEL
TIMOTHY A. FRENCH
**NEAL, GERBER & EISENBERG**

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/s/ Anne M. Martorano
Anne M. Martorano

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ENGINE MANUFACTURERS ASSOCIATION

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA,
WESTERN DIVISION

| | |
|---|---|
| ENGINE MANUFACTURERS ASSOCIATION,<br>Plaintiff,<br>vs.<br>SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT ("SCAQMD"), et al.,<br>Defendants. | CASE NO. 00-09065 FMC (BQRx)<br>**STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BY DEFENDANT SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT**<br>**[FRCP 56(b)]**<br>Date: May 21, 2001<br>Time: 10:00 a.m.<br>Courtroom: 750 |
| NATURAL RESOURCES DEFENSE COUNCIL, INC.; COALITION FOR CLEAN AIR, INC.; COMMUNITIES FOR A BETTER ENVIRONMENT, INC.; PLANNING AND CONSERVATION LEAGUE; and SIERRA CLUB,<br>Defendants-in-Intervention.<br>WESTERN STATES PETROLEUM ASSOCIATION,<br>Plaintiff-in-Intervention. | |

After consideration of the papers in support of and in opposition to the Motion for Summary Judgment by Defendant South Coast Air Quality Management District and the oral argument of counsel, the Court determines that the following facts have been established as



UNCONTROVERTED FACTS

1. Rule 1191 of the South Coast Air Quality Management District (hereinafter referred to as "SCAQMD" or "the District") applies to governmental entities that own, lease or operate fleets of light-duty and medium-duty vehicles.

[Appendix of Exhibits to Motion for Summary Judgment by Defendant South Coast Air Quality Management District (hereafter "App. Exh.") 1 at 2].

2. Under Rule 1191, when the specified fleet operators add or replace vehicles in their fleets, those operators must acquire non-diesel powered vehicles that meet the low-emission vehicle standard established by the California Air Resources Board ("CARB"), or one of CARB's more stringent emissions standards.

[App. Exh. 1 at 3-4].

3. Rule 1192 of the SCAQMD applies to specified fleet operators in the District that are public entities that own, lease, or operate a fleet of 15 or more public transit vehicles or urban buses.

[App. Exh. 2 at 38-39.]

4. Rule 1192 of the SCAQMD also applies to specified fleet operators in the District that are private entities under contract with a government agency or a public transit agency to provide transit services.

[App. Exh. 2 at 38-39].

5. Under Rule 1192, when the specified fleet operators add or replace vehicles in their fleets, those operators must acquire alternative-fuel vehicles.

[App. Exh. 2 at 39].

6. Rule 1193 of the SCAQMD applies to specified fleet operators that are public or private entities that own, lease, or operate a fleet of 15 or more solid waste collection, transfer, or "rolloff" vehicles in the District.

[App. Exh. 3 at 77].

7. Under Rule 1193, when the specified fleet operators add or replace vehicles in their fleets, those operators must acquire alternative-fuel vehicles.

[App. Exh. 3 at 77].

8. Rule 1194 of the SCAQMD applies to specified fleet operators that are public or private entities that provide passenger transportation services in and out of commercial airports in the District.

[App. Exh. 4 at 88, 90-91].

9. Under Rule 1194, when the specified fleet operators that use passenger cars or medium-duty vehicles add or replace vehicles in their fleets, those operators must purchase or lease a specified percentage of vehicles that meet CARB's ultra low-emission vehicle standards or one of CARB's more stringent emissions standards.

[App. Exh. 4 at 90-91].

10. Under Rule 1994, when the specified fleet operators that use heavy-duty vehicles add or replace vehicles in their fleets, those operators must purchase or lease alternative fuel vehicles.

[App. Exh. 4 at 90-91].



11. Rule 1186.1 of the SCAQMD applies to specified operators in the District that own or lease at least 15 or more vehicles and provide street-sweeping services.

[App. Exh. 5 at 108].

12. Rule 1186.1 of the SCAQMD applies to specified fleet operators that are private entities under contract to provide street-sweeping services.

[App. Exh. 5 at 108].

13. Under Rule 1186.1, when the specified fleet operators add or replace street-sweepers in their fleets, those operators must purchase or lease alternative-fuel street-sweepers.

[App. Exh. 5 at 108-09].

14. Rule 1196 of the SCAQMD applies to specified fleet operators that own or lease 15 or more heavy-duty vehicles.

[App. Exh. 5 at 120-21].

15. Under Rule 1196, when the specified fleet operators add or replace heavy-duty vehicles, those operators must purchase or lease alternative-fuel vehicles, dual-fuel vehicles, or dedicated gasoline vehicles.

[App. Exh. 5 120-21].

16. Under California Health and Safety Code Section 43153, only vehicles that CARB has certified may be sold in California.

[Cal. Health & Safety Code § 43153].

17. Under Section 209 of the Clean Air Act, 42 U.S.C. § 7509, the State of California may apply to the federal Environmental Protection Agency for a waiver of preemption from the regulation of vehicles and vehicle engines.

[42 U.S.C. § 7509].

18. CARB has certified vehicles for purchase or lease that comply with Rules 1191, 1192, 1193, 1194, 1186.1, and 1196 of the SCAQMD.

[Declaration of Larry Irwin, ¶ 7].

Based on the Foregoing Uncontroverted Facts, the Court now makes its

## CONCLUSIONS OF LAW

1. Rules 1191, 1192, 1193, 1194, 1186.1, and 1196 of the SCAQMD do not establish or enforce standards relating to the control of emissions from new motor vehicles or new motor vehicle engines within the meaning of Section 209 of the Clean Air Act, 42 U.S.C.§ 7509.

2. Rules 1191, 1192, 1193, 1194, 1186.1, and 1196 of the SCAQMD do not require any certification, inspection, or approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as a condition precedent to the initial sale, titling, or registration of such motor vehicle, motor vehicle engine, or equipment within the meaning of Section 209 of the Clean Air Act, 42 U.S.C.§ 7509.

3. Rules 1191, 1192, 1193, 1194, 1186.1, and 1196 of the SCAQMD do not prohibit or limit, directly or indirectly, the manufacture or sale of a new motor vehicle or motor vehicle engine that is certified in California as



meeting California standards within the meaning of Section 177 of the Clean Air Act, 42 U.S.C. § 7507.

4. Rules 1191, 1192, 1193, 1194, 1186.1, and 1196 of the SCAQMD do not create, or have the effect of creating, a motor vehicle or motor vehicle engine different than a motor vehicle or engine certified in California under California standards ("a third vehicle") or otherwise create such a "third vehicle" within the meaning of Section 177 of the Clean Air Act, 42 U.S.C. § 7507.

5. Rules 1191, 1192, 1193, 1194, 1186.1, and 1196 of the SCAQMD are not preempted under the Supremacy Clause of the United States Constitution.

6. Substantial evidence in the District's administrative record for Rules 1191, 1192, 1193, 1194, 1186.1, and 1196 supports the District's conclusion that fuels such as methanol and natural gas are equivalently clean-burning alternative fuels within the meaning of California Health and Safety Code Section 40447.5.

7. The District did not violate California Health and Safety Code Section 40447.5 in adopting Rules 1191, 1192, 1193, 1194, 1186.1, and 1196.

8. Rules 1191, 1192, 1193, 1194, 1186.1, and 1196 of the SCAQMD were lawfully enacted and are lawful and valid in all respects.

Dated: March ___, 2001

HON. FLORENCE-MARIE COOPER
United States District Court Judge
Central District of California



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Attorneys for Plaintiff

**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

| | |
|---|---|
| ENGINE MANUFACTURERS ASSOCIATION,<br><br>Plaintiff,<br><br>v.<br><br>SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT ("SCAQMD"), et al.,<br><br>Defendants.<br><br>NATURAL RESOURCES DEFENSE COUNCIL, INC., COALITION FOR CLEAN AIR, INC., COMMUNITIES FOR A BETTER ENVIRONMENT, | Case No. 00-09065 FMC (BQRx)<br><br>DECLARATION OF JOHN W. DUERR IN SUPPORT OF PLAINTIFF ENGINE MANUFACTURERS ASSOCIATION'S MOTION FOR SUMMARY JUDGMENT<br><br>Date: May 21, 2001<br>Time: 10:00 a.m.<br>Courtroom: 750 |

| | |
|---|---|
| INC., PLANNING AND CONSERVATION LEAGUE, and SIERRA CLUB, Intervenors. | Honorable Florence-Marie Cooper United States District Judge |
| WESTERN STATES PETROLEUM ASSOCIATION, Intervenor. | (Filed Mar. 23, 1001) |

I, John W. Duerr, declare as follows:

1. I am employed by Detroit Diesel Corporation as Manager, Regulatory Activities. I have personal knowledge of the facts stated in this declaration, except those facts stated on information and belief, and if called to testify as a witness to such matters under oath, I could and would competently testify thereto. As to those matters stated upon information and belief, I am informed and believe and on that basis declare such facts are true to the best of my knowledge.

2. Detroit Diesel Corporation ("DDC") is a member of the Engine Manufacturers Association. DDC makes many models of internal combustion engines, including various compression-ignition diesel-fueled engines for use in several types of heavy-duty on-highway motor vehicles, such as trucks and buses.

3. Before a new heavy-duty diesel-fueled motor vehicle engine may be sold in the United States, it must be certified by the United States Environmental Protection Agency ("EPA") as meeting all applicable EPA emission-control regulations and standards. As part of the on-highway engine certification process, DDC submits detailed engine



emission testing data and other information to demonstrate that an on-highway engine model complies with the applicable engine emission standards, including the emission standards for oxides of nitrogen, hydrocarbons, carbon monoxide, and particulate matter emissions. If, based on the submitted information, EPA is satisfied that an on-highway engine model meets the applicable emission standards, EPA will issue a certificate that certifies the engine model for sale during the next model year.

4. California has its own emission standards applicable to new heavy-duty on-highway diesel-fueled motor vehicle engines sold into California. Accordingly, DDC follows a similar process of submitting engine testing data and other information to the California Air Resources Board ("ARB") to obtain engine certification. Like EPA, if the ARB is satisfied, based on the information submitted, that an on-highway engine model satisfies the applicable ARB emission standards and requirements, then the ARB will issue an Executive Order approving the sale of the heavy-duty on-highway engine model during the next model year.

5. DDC has followed the required data submittal process and has received certification from ARB and EPA for the sale of various models of on-highway diesel-fueled engines during the 2001 model year. A schedule of DDC's heavy-duty on-highway diesel-fueled engines that the ARB has certified for sale in California for the 2001 model year is appended to this declaration as Exhibit 1.

6. Upon information and belief, it is my understanding that the South Coast Air quality Management District ("SCAQMD") has adopted a series of rules (the "SCAQMD Fleet Rules") that prohibit or limit certain local fleet

operators from acquiring on-highway diesel-fueled motor vehicles and engines. Based on that understanding, Exhibit 1 lists the on-highway diesel-fueled motor vehicle engine models that DDC manufactures, and that are currently certified by the ARB for sale in California, the purchase and sale of which is prohibited or limited under the SCAQMD Fleet Rules.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 23rd day of March, 2001.

/s/ John W. Duerr
JOHN W. DUERR

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## DDC DIESEL-FUELED ENGINE FAMILIES CERTIFIED FOR 2001

## ON-HIGHWAY

| Engine Family | Engine Type | EPA Cert. Effective Date | EPA Certificate Effective Number | CARB EO Effective Date | CARB EO NUMBER |
|---|---|---|---|---|---|
| 1DDXH08.5FJY | Series 50 Bus - EGR | 5-8-00 | DDX-URB-01-01 | 5-18-00 | A-290-89 |
| 1DDXH08.5EJL | Series 50 Truck | 12-8-00 | DDX-HHDD-01-03 | 1-16-01 | A-290-92 |
| 1DDXH08.5EJB | Series 50 – 350 Truck | 12-8-00 | DDX-HHDD-01-02 | 1-16-01 | A-290-91 |
| 1DDXH12.7EGL | Series 60, 12.7L | 12-8-00 | DDX-HHDD-01-04 | 1-16-01 | A-290-93 |
| 1DDXH14.0ELL | Series 60, 14.0L | 12-8-00 | DDX-HHDD-01-01 | 1-16-01 | A-290-94 |
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**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

| | |
|---|---|
| ENGINE MANUFACTURERS ASSOCIATION,<br><br>Plaintiff,<br><br>v.<br><br>SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT ("SCAQMD"), et al.,<br><br>Defendants.<br><br>NATURAL RESOURCES DEFENSE COUNCIL, INC., COALITION FOR CLEAN AIR, INC., COMMUNITIES FOR A BETTER ENVIRONMENT, | Case No. 00-09065 FMC (BQRx)<br><br>DECLARATION OF EUGENE M. SWEENEY IN SUPPORT OF PLAINTIFF ENGINE MANUFACTURERS ASSOCIATION'S MOTION FOR SUMMARY JUDGMENT<br><br>Date: May 21, 2001<br>Time: 10:00 a.m.<br>Courtroom: 750 |

| | | |
|---|---|---|
| INC., PLANNING AND CONSERVATION LEAGUE, and SIERRA CLUB, Intervenors. | ) | Honorable Florence-Marie Cooper United States District Judge |
| WESTERN STATES PETROLEUM ASSOCIATION, Intervenor. | ) | (Filed Mar. 23, 2001) |

I, Eugene M. Sweeney, declare as follows:

1. I am employed by Caterpillar Inc. as Manager of Technical Support. I have personal knowledge of the facts stated in this declaration, except those facts stated on information and belief, and if called to testify as a witness to such matters under oath, I could and would competently testify thereto. As to those matters stated upon information and belief, I am informed and believe and on that basis declare such facts are true to the best of my knowledge.

2. Caterpillar Inc. ("Caterpillar") is a member of the Engine Manufacturers Association. Caterpillar makes many models of internal combustion engines, including various compression-ignition diesel-fueled engines for use in several types of on-highway motor vehicles, such as vans, trucks and buses.

3. Before a new on-highway diesel-fueled motor vehicle engine may be sold in the United States, it must be certified by the United States Environmental Protection Agency ("EPA") as meeting all applicable EPA emission-control regulations and standards. As part of the on-highway engine certification process, Caterpillar submits



detailed engine emission testing data to demonstrate that an on-highway engine model complies with the applicable engine emission standards, including the emission standards for oxides of nitrogen, hydrocarbons, carbon monoxide, and particulate matter emissions. If, based on the submitted data, EPA is satisfied that an on-highway engine model meets the applicable emission standards, EPA will issue a certificate that certifies the engine model for sale during the next model year.

4. California has its own emission standards applicable to new on-highway diesel-fueled motor vehicle engines sold into California. Accordingly, Caterpillar follows a similar process of submitting engine testing data to the California Air Resources Board ("CARB") to obtain engine certification. Like EPA, if the CARB is satisfied, based on the engine test data submitted, that an on-highway engine model satisfies the applicable CARB emission standards and requirements, then the CARB will issue an Executive Order approving the sale of the on-highway engine model during the next model year.

5. Caterpillar has followed the required data submittal process and has received certification from CARB and EPA for the sale of various models of on-highway diesel-fueled engines during the 2001 model year. A schedule of Caterpillar's on-highway diesel-fueled engines that the CARB has certified for sale in California for the 2001 model year is appended to this declaration as Exhibit 1.

6. Upon information and belief, it is my understanding that the South Coast Air quality Management District ("SCAQMD") has adopted a series of rules (the "SCAQMD Fleet Rules") that prohibit or limit certain local fleet operators from acquiring on-highway diesel-fueled motor

vehicles and engines. Based on that understanding, Exhibit 1 lists the on-highway diesel-fueled motor vehicle engine models that Caterpillar manufactures, and that are currently certified by the CARB for sale in California, the purchase and sale of which is prohibited or limited under the SCAQMD Fleet Rules.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 22nd day of March, 2001.

/s/ Eugene M. Sweeney
EUGENE M. SWEENEY

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## CATERPILLAR DIESEL-FUELED ON-HIGHWAY ENGINE FAMILIES CERTIFIED FOR 2001

| Model | Engine Family | EPA Eff. Date | EPA Cert. No. | CARB EO Eff. Date | CARB EO No. |
|---|---|---|---|---|---|
| 3126E (Bank) | 1CPXH0442HBK | 1/29/01 | CPX-MHDD-01-05.1 | 2/9/01 | A-13-143 |
| 3126E | 1CPXH0442HRK | 12/21/00 | CPX-MHDD-01-02 | 12/21/00 | A-13-138 |
| 3126E (LEV) | 1CPXHL442HAK | 8/2/00 | CPX-MHDD-01-01.8 | 8/8/00 | A-13-137 |
| C10 | 1CPXH0629ERK | 12/21/00 | CPX-HHDD-01-01 | 12/21/00 | A-13-139 |
| C12 | 1CPXH0729ERK | 12/21/00 | CPX-HHDD-01-02 | 12/21/00 | A-13-140 |
| C15 | 1CPXH089ERK | 12/21/00 | CPX-HHDD-01-03 | 12/21/00 | A-13-141 |
| C16 | 1CPXH0967ERK | 12/21/00 | CPX-HHDD-01-04 | 12/21/00 | A-13-142 |

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**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

| | |
|---|---|
| ENGINE MANUFACTURERS ASSOCIATION,<br><br>Plaintiff,<br><br>v.<br><br>SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT ("SCAQMD"), et al.,<br><br>Defendants.<br><br>NATURAL RESOURCES DEFENSE COUNCIL, INC., COALITION FOR CLEAN AIR, INC., COMMUNITIES FOR A BETTER ENVIRONMENT, | Case No. 00-09065 FMC (BQRx)<br><br>DECLARATION OF STEVEN R. BUTLER IN SUPPORT OF PLAINTIFF ENGINE MANUFACTURERS ASSOCIATION'S MOTION FOR SUMMARY JUDGMENT<br><br>Date: May 21, 2001<br>Time: 10:00 a.m.<br>Courtroom: 750 |

| | | |
|---|---|---|
| INC., PLANNING AND CONSERVATION LEAGUE, and SIERRA CLUB, Intervenors. | ) | Honorable Florence-Marie Cooper United States District Judge |
| WESTERN STATES PETROLEUM ASSOCIATION, Intervenor. | ) | |

I, Steven R. Butler, declare as follows:

1. I am employed by Cummins Inc. as an Engine Certification Director. I have personal knowledge of the facts stated in this declaration, except those facts stated on information and belief, and if called to testify as a witness to such matters under oath, I could and would competently testify thereto. As to those matters stated upon information and belief, I am informed and believe and on that basis declare such facts are true to the best of my knowledge.

2. Cummins Inc. ("Cummins") is a member of the Engine Manufacturers Association. Cummins makes many models of internal combustion engines, including various compression-ignition diesel-fueled engines for use in several types of on-highway motor vehicles, such as vans, trucks and buses.

3. Before a new diesel-fueled motor vehicle engine may be sold in the United States, it must be certified by the United States Environmental Protection Agency ("EPA") as meeting all applicable EPA emission-control regulations and standards. As part of the on-highway engine certification process, Cummins submits detailed



engine emission testing data to demonstrate that an on-highway engine model complies with the applicable engine emission standards, including the emission standards for oxides of nitrogen, hydrocarbons, carbon monoxide, and particulate matter emissions. If, based on the submitted data, EPA is satisfied that an on-highway engine model meets the applicable emission standards, EPA will issue a certificate that certifies the engine model for sale during the next model year.

4. California has its own emission standards applicable to new on-highway diesel-fueled motor vehicle engines sold into California. Accordingly, Cummins follows a similar process of submitting engine testing data to the California Air Resources Board ("ARB") to obtain engine certification. Like EPA, if the ARB is satisfied, based on the engine test data submitted, that an on-highway engine model satisfies the applicable ARB emission standards and requirements, then the ARB will issue an Executive Order approving the sale of the on-highway engine model during the next model year.

5. Cummins has followed the required data submittal process and has received certification from ARB and EPA for the sale of various models of on-highway diesel-fueled engines during the 2001 model year. A schedule of Cummins' on-highway diesel-fueled engines that the ARB has certified for sale in California for the 2001 model year is appended to this declaration as Exhibit 1.

6. Upon information and belief, it is my understanding that the South Coast Air Quality Management District ("SCAQMD") has adopted a series of rules (the "SCAQMD Fleet Rules") that prohibit or limit certain local fleet

operators from acquiring on-highway diesel-fueled motor vehicles and engines. Based on that understanding, Exhibit 1 lists the on-highway diesel-fueled motor vehicle engine models that Cummins manufactures, and that are currently certified by the ARB for sale in California, the purchase and sale of which is prohibited or limited under the SCAQMD Fleet Rules.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 23rd day of March, 2001.

/s/ Steven R. Butler
STEVEN R. BUTLER

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CUMMINS 2001 CARB DIESEL AUTOMOTIVE ENGINE FAMILY

## CUMMINS 2001 CARB DIESEL AUTOMOTIVE ENGINE FAMILIES

| MILY | EPA Family Name | CARB EO # | CPL No.s | COMMENTS | HP Range |
|---|---|---|---|---|---|
| 93A4 | 1CEXH0855NAD | Not available | 2592 | 99N14+ NE3 | 435 - 525 |
| 093A5 | 1CEXH0855NAE | Not available | 2591 | 99N14+ NE2 | 370 - 475 |
| 093A6 | 1CEXH0855NAF | Not available | 2590 | 99N14+ NE1 | 350 - 425 |
| 103E | 1CEXH0912XAE | A-21-301 | 2834 | 99 APEX | 475 - 600 |
| 103C | 1CEXH0912XAC | A-21-299 | 2629 | 99 ISX | 475 - 500 |
| 103D | 1CEXH0912XAD | A-21-300 | 2628, 8046 | 99 ISX | 400 - 450 |
| 353Q | 1CEXH0661MAQ | A-21-297 | 2350, 2608 | 99 ISM LE2 | 330 - 500 |
| 353R | 1CEXH0661MAR | A-21-298 | 2607 | 99 ISM LE1 | 280 - 350 |
| 353P | 1CEXH0661MAP | Not available | 2201 | 99 UBUS | 280 - 330 |
| 563A | 1CEXH0540LAA | A-21-304 | 2475, 2946 | ISL | 310 - 370 |
| 563B | 1CEXH0540LAB | Not available | 8042 | ISL UBUS | 330 |
| 383D | 1CEXH0239BAD | A-21-289 | 2938 | 4B ECHO | 145 - 170 |
| 383E | 1CEXH0239BAE | A-21-290 | 8057 | 4B ECHO CFFV | 145 - 170 |
| 403Z | 1CEXA0359BAZ | A-21-288 | 2903 | Chrys CARB | 235 - 245 |
| 403O | 1CEXH0359BAO | A-21-292 | 2595,-96,-97 | CFF with CAT | 185 - 215 |
| 403U | 1CEXH0359BAU | A-21-293 | 2981, 2682 | 2000 ISB | |
| 403V | 1CEXH0359BAV | A-21-294 | 2683,-84,-85, -86,-87 | 2000 ISB | 260 - 300 |
| 13M | 1CEXH0505CAM | A-21-291 | 2236, 2237 | ISC UBUS | 250 - 280 |
| 413N | 1CEXH0505CAN | Not available | 2694, 2695 | 2000 ISC | 330 - 350 |
| 413O | 1CEXH0505CAO | Not available | 2691, -92, -93, -94 | 2000 ISC | 260 - 315 |
| 413P | 1CEXH0505CAP | Not available | 2688, -89, -90 | 2000 ISC | 225 - 260 |

E.O.s marked "Not available" have not been issued at this time (2/8/00) but are in process and we should have them soon.

Families 093A6, 353R and 413O will be impacted by Rule 1193

Families 095A5, 103D, and 353Q will be impacted by Rule 1196

Family 403U will be impacted by Rule 1191.

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**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

| | |
|---|---|
| ENGINE MANUFACTURERS ASSOCIATION,<br><br>Plaintiff,<br><br>v.<br><br>SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT ("SCAQMD"), et al.,<br><br>Defendants. | Case No. 00-09065 FMC (BQRx)<br><br>**DECLARATION OF JEFFREY A. MARSEE IN SUPPORT OF PLAINTIFF ENGINE MANUFACTURERS ASSOCIATION'S MOTION FOR SUMMARY JUDGMENT**<br>Date: May 21, 2001<br>Time: 10:00 a.m.<br>Courtroom: 750 |

| | |
|---|---|
| NATURAL RESOURCES DEFENSE COUNCIL, INC., COALITION FOR CLEAN AIR, INC., COMMUNITIES FOR A BETTER ENVIRONMENT, INC., PLANNING AND CONSERVATION LEAGUE, and SIERRA CLUB, Intervenors. | ) Honorable Florence-Marie Cooper<br>) United States District Judge<br>) (Filed Mar. 23, 2001) |
| WESTERN STATES PETROLEUM ASSOCIATION, Intervenor. | ) |

I, Jeffrey A. Marsee, declare as follows:

1. I am employed by Isuzu Motors America, Inc. as Manager of Vehicle Compliance. I have personal knowledge of the facts stated in this declaration, except those facts stated on information and belief, and if called to testify as a witness to such matters under oath, I could and would competently testify thereto. As to those matters stated upon information and belief, I am informed and believe and on that basis declare such facts are true to the best of my knowledge.

2. Isuzu Motors America, Inc. ("Isuzu") is a member of the Engine Manufacturers Association. Isuzu is involved in the certification process for many models of internal combustion engines, including various compression-ignition diesel-fueled engines for use in several types of on-highway motor vehicles, such as vans, trucks and buses.



3. Before a new diesel-fueled motor vehicle engine may be sold in the United States, it must be certified by the United States Environmental Protection Agency ("EPA") as meeting all applicable EPA emission-control regulations and standards. As part of the on-highway engine certification process, Isuzu submits detailed engine emission testing data to demonstrate that an on-highway engine model complies with the applicable engine emission standards, including the emission standards for oxides of nitrogen, hydrocarbons, carbon monoxide, and particulate matter emissions. If, based on the submitted data, EPA is satisfied that an on-highway engine model meets the applicable emission standards, EPA will issue a certificate that certifies the engine model for sale during the next model year.

4. California has its own emission standards applicable to new on-highway diesel-fueled motor vehicle engines sold into California. Accordingly, Isuzu follows a similar process of submitting engine testing data to the California Air Resources Board ("ARB") to obtain engine certification. Like EPA, if the ARB is satisfied, based on the engine test data submitted, that an on-highway engine model satisfies the applicable ARB emission standards and requirements, then the ARB will issue an Executive Order approving the sale of the on-highway engine model during the next model year.

5. Isuzu has followed the required data submittal process and has received certification from ARB and EPA for the sale of various models of on-highway diesel-fueled engines during the 2001 model year. A schedule of Isuzu's on-highway diesel-fueled engines that the

ARB has certified for sale in California for the 2001 model year is appended to this declaration as Exhibit 1.

6. Upon information and belief, it is my understanding that the South Coast Air Quality Management District ("SCAQMD") has adopted a series of rules (the "SCAQMD Fleet Rules") that prohibit or limit certain local fleet operators from acquiring on-highway diesel-fueled motor vehicles and engines. Based on that understanding, Exhibit 1 lists the on-highway diesel-fueled motor vehicle engine models that Isuzu manufacturers,' and that are currently certified by the ARB for sale in California, the purchase and sale of which is prohibited or limited under the SCAQMD Fleet Rules.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 23th [sic] day of March, 2001.

/s/ Jeffrey A. Marsee
JEFFREY A. MARSEE

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**Isuzu Engine Families for California**

- **Inline 6 Cylinder (6H) Model YSZXH07.84RA.**
- **Inline 4 Cylinder (4H) Model YSZXH04.83AA**

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

| | |
|---|---|
| ENGINE MANUFACTURERS ASSOCIATION,<br>Plaintiff,<br>vs.<br>SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT ("SCAQMD"), et al.,<br>Defendants. | CASE NO. 00-09065 FMC (BQRx)<br>**DECLARATION OF LARRY IRWIN IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BY DEFENDANT SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT**<br>**[FRCP 56(b)]**<br>Date: May 21, 2001<br>Time: 10:00 a.m.<br>Courtroom: 750 |
| NATURAL RESOURCES DEFENSE COUNCIL, INC.; COALITION FOR CLEAN AIR, INC.; COMMUNITIES FOR A BETTER ENVIRONMENT, INC.; PLANNING AND CONSERVATION LEAGUE, and SIERRA CLUB,<br>Defendants-in-Intervention. | |

I, Larry Irwin, declare:

1. I am an Air Quality Specialist in the Planning Division of the South Coast Air Quality Management District with responsibility for mobile source rule implementation. For the past ten years, my primary duties have been mobile source rule development and implementation. Among my job responsibilities are monitoring the development and use of alternative fuel

vehicles and the availability of alternative fuel vehicles. I have a Bachelor of Science degree in physics from Ohio State University.

2. The California Air Resources Board ("CARB") has the responsibility for regulating emissions of air pollutants from motor vehicles operated in California. CARB accordingly administers exhaust emissions standards for various classes of new motor vehicle-passenger cars, light-duty trucks, medium-duty vehicles, and engines used in heavy-duty vehicles.

3. In 1990-1991, CARB adopted the California Low-Emission Vehicle (LEV) regulations for cars, light-duty trucks, and medium-duty vehicles. Every new car, light-duty truck, or medium-duty vehicle offered for sale in California must be certified by CARB as complying with the LEV regulations. The LEV regulations consist of tailpipe emissions standards and four increasingly stringent, low-emission vehicle categories to which each vehicle must be certified. The categories are Transitional Low-Emission Vehicle, Low-Emission Vehicle, Ultra-Low-Emission Vehicle, and Zero-Emission Vehicle. The LEV regulations also require that for each model year between 1994 and 2003, manufacturers must identify the average emissions level of non-methane organic gases (NMOG) to which its fleet of cars and light trucks was certified, and then, on certain target dates, meet an incrementally more stringent fleet average NMOG level for its fleet.

4. CARB also has adopted exhaust emissions standards for heavy-duty engines. All heavy-duty engines offered for sale in California must meet CARB's exhaust emissions standards.



5. The Fleet Rules are expressly designed to work in tandem with CARB's certification process. Each of the Fleet Rules requires fleet operators to purchase certified vehicles in the lower-polluting categories. The vehicles meeting the Fleet Rules requirements are currently available and certified for use in California. In fact, as a result of the production component of CARB's rules, manufacturers must produce some vehicles in some of the cleaner emissions classes for sale in California.

6. The Fleet Rules rely on CARB's determinations and requirements regarding vehicle emission levels. The purpose of the Fleet Rules is to require fleet operators to purchase the lower-emitting certified vehicles when they are available. If, for some unexpected reason, lower-polluting vehicles are unavailable for purchase from dealers or from engine and vehicle manufacturers, the Fleet Rules allow fleet operators to purchase higher-polluting certified vehicles.

7. Attached to my declaration is a list of vehicles that CARB has certified and that meet the requirements of the Fleet Rules. The list is broken down into categories corresponding to each of the individual Fleet Rules. I compiled the list by examining (1) vehicle data supplied to me by CARB, and (2) executive orders issued by CARB that specify CARB's emissions certifications.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this twenty-first day of March, 2001, at Diamond, Bar, California.

/s/ Larry Irwin
Larry Irwin, Declarant

EXHIBIT TO DECLARATION OF LARRY IRWIN

AQMD Rule 1191 Compliant

# Medium-Duty Engines and Incomplete Vehicles
# MY2001

ARB Exective Order Data

**INCOMPLETE MEDIUM-DUTY VEHICLES**

| Vehicle Manufacturer | Engine Mfr | Executive Order | Fuel | Engine Family | Liter Disp | CID | HP | Emis Std | MODELS |
|---|---|---|---|---|---|---|---|---|---|
| GFI | GFI | A-325-30 | LPG or Gaso | 1G9XH06.87CP | 6.8 | 417 | 310 | ULEV | F-350 (Ford evaporative control system) |
| | GFI | A-325-29 | LPG or Gaso | 1G9XH06.87CP | 6.8 | 417 | 310 | ULEV | V 10 GFP (Torque 425) |
| Ford | Ford | A-10-987 | Gasoline | 1FMXH06.8TH5 | 6.8 | 417 | 310 | ULEV | E-350: Commercial Cutaway, RV Cutaway, Commercial Stripped Chassis. E-Super Duty Cutaway F-350 Reg Cab, Sub Cab, Crew Cab. |
| Ford | Ford | A-10-992 | Gasoline | 1FMXH05.4TH5 | 5.4 | 326 | 255 | ULEV | E-Series, E-350 F-Series F-250HD F-350 |

**MEDIUM-DUTY ENGINES**

| Engine Mfr | Executive Order | Fuel | Engine Family | Liter Disp | CID | HP | Emis Std | MODELS |
|---|---|---|---|---|---|---|---|---|
| Ford | A-10-986 | Gasoline | 1FMXH06.8TH5 | 6.8 | 417 | 310 | ULEV | E series, F Series |
| Ford | A-10-991 | Gasoline | 1FMXH05.4TH5 | 5.4 | 326 | 255 | ULEV | E series, F Series |

AQMD Rule 1191 Compliant

**Medium-Duty Vehicles**
**MY2000**

sorted by Mfr.

| | A | B | C | D | E | F | G | H | I |
|---|---|---|---|---|---|---|---|---|---|
| 1 | MFR | ARB Exec Order | Engine Family | VEH CLS | EXH STD | EXH FUEL TYPE | EXH CERT FUEL | ECS TYPE | MODELS |
| 2 | BMW | A-8-122 | YBMXT04.453M | M2 | LEV | DED | PH2 | 2TWC,2H02S(2),SFI,AIR | BMW |
| 3 | CHRY | A-9-462-1 | YCRXA0360H32 | M2 | LEV | DED | PH2 | HO2S(2),SFI,TWC | DODGE |
| 4 | CHRY | A-9-464 | YCRXA0360H31 | M2 | LEV | DED | PH2 | 2WUOC,2HO2S(2),TWC,SFI | DODGE |
| 5 | CHRY | A-9-465 | YCRXA0360J31 | M3 | LEV | DED | PH2 | 2WUOC,2HO2S(2),TWC,SFI | DODGE |
| 6 | CHRY | A-9-462 | YCRXA0360H32 | M2 | LEV | DED | PH2 | HO2S(2),TWC,SFI | DODGE |
| 7 | FORD | A-10-898 | YFMXA04.2JGC | M3 | LEV | DED | IND | 2TWC(2),2HO2S(2),SFI,EGR | FORD |
| 8 | FORD | A-10-906 | YFMXA05.4HGC | M2 | LEV | DED | PH2 | 2TWC(2),2HO2S(2),SFI,EGR | FORD |
| 9 | FORD | A-10-905 | YFMXA05.4RF7 | M3 | LEV | DED | IND | 2TWC(2),2HO2S(2),SFI,EGR; 2TWC,TWC,2HO2S,HO2S,EGR,SFI | FORD, LINCOLN |
| 10 | FORD | A-10-900 | YFMXA04.6HGC | M2 | LEV | DED | PH2 | 2TWC(2),2HO2S(2),SFI,EGR | FORD |
| 11 | FORD | A-10-904 | YFMXA05.4JGP | M3 | LEV | DED | IND | TWC,2HO2S,HO2S,SFI,EGR | FORD |
| 12 | FORD | A-10-910 | YFMXA06.8JGC | M3 | LEV | DED | PH2 | 2TWC,TWC,2HO2S,H02S,SFI,EGR | FORD |
| 13 | FORD | A-10-901 | YFMXA04.66FF | M3 | LEV | DED | IND | 2TWC(2),2HO2S(2),SFI,EGR | FORD |
| 14 | FORD | A-10-897 | YFMXT04.2HGC | M2 | LEV | DED | IND | 2TWC(2),2HO2S(2),SFI,EGR | FORD |
| 15 | FORD | A-10-909 | YFMXA06.8JGN | M3 | LEV | DED | PH2 | TWC,2HO2S,H02S,SFI,EGR | FORD |
| 16 | GM | A-6-920 | YGMXA05.3184 | M3 | LEV | DED | PH2 | SFI,EGR,2TWC,2HO2S(2),AIR | CHEVROLET, GMC |
| 17 | GM | A-6-914 | YGMXA04.3192 | M2 | LEV | DED | PH2 | SFI,EGR,TWC,HO2S(2),AIR,WU-TWC | CHEVROLET, GMC |
| 18 | GM | A-6-919 | YGMXA05.3183 | M2 | LEV | DED | PH2 | SFI,EGR,2TWC,2HO2S(2),AIR | CHEVROLET, GMC |
| 19 | GM | A-6-922 | YGMXA05.7194 | M2 | LEV | DED | PH2 | SFI,EGR,2TWC,2HO2S(2),AIR | CHEVROLET, GMC |
| 20 | GM | A-6-923 | YGMXA05.7185 | M3 | LEV | DED | PH2 | SFI,EGR,2TWC,2HO2S(2),AIR | CHEVROLET, GMC,CADILLAC |
| 21 | GM | A-6-912 | YGMXA04.3190 | M2 | LEV | DED | PH2 | SFI,EGR,2TWC,2HO2S(2),AIR | CHEVROLET, GMC |
| 22 | MB | A-3-196 | YMBXT04.3GNB | M2 | LEV | DED | PH2 | SFI,AIR,EGR,2HO2S(2),2WU-TWC, 2TWC | MERCEDES-BENZ |
| 23 | MB | A-3-197 | YMBXT05.5GNB | M2 | LEV | DED | PH2 | SFI,AIR,EGR,2HO2S(2),2WU-TWC, 2TWC | MERCEDES-BENZ |
| 24 | MB | A-3-194 | YMBXT03.2GNB | M2 | LEV | DED | PH2 | SFI,AIR,EGR,2HO2S(2),2WU-TWC, 2TWC | MERCEDES-BENZ |
| 25 | ROVR | A-277-21 | YLRXT04.6002 | M2 | LEV | DED | PH2 | 2TWC,SFI,2HO2S(2),AIR | LAND ROVER |
| 26 | TOTA | A-14-379 | YTYXT04.7GBX | M3 | LEV | DED | PH2 | SFI,2TWC(2),2HO2S(2) | TOYOTA, LEXUS |
| 27 | TOTA | A-14-378 | YTYXT04.7GXW | M2 | LEV | DED | PH2 | SFI, 2TWC,TWC,2HO2S(2) | TOYOTA |
| 28 | CHRY | A-9-469 | YCRXT05.26RC | M3 | SULEV | DED | CNG | TWC,OC,SFI,2HO2S | CHRYSLER |
| 29 | FORD | A-10-907 | YFMXT05.4RP5 | M3 | SULEV | DED | CNG | 2TWC(2),TWC,2HO2S,SFI | FORD |
| 30 | FORD | A-10-908 | YFMXT05.4RP6 | M3 | SULEV | DED | CNG | 2TWC,TWC,2HO2S,SFI | FORD |
| 31 | CHRY | A-9-461 | YCRXA0287H41 | M2 | ULEV | DED | PH2 | 2HO2S(2),2WUOC,SFI,TWC | DODGE |
| 32 | GM | A-6-911 | YGMXA04.3189 | M2 | ULEV | DED | PH2 | SFI,EGR,TWC,2HO2S(2),HO2S, WU-TWC | CHEVROLET, GMC |



Received 12/1/99

AQMD Rule 1192 Compliant

# Heavy-Duty Engines and Incomplete Vehicles
# MY2001

ARB Executive Order Data

| HEAVY-DUTY ENGINES | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| Engine Mfr | Exec Order | Fuel | Vehicle Class | Engine Family | Liter Disp | CID | Max HP | Torq | MODELS |
| Deere | A-108-22 | CNG | Urban Bus | 1JDXH08.1001 | 8.1 | 497 | 280 | 900 | 6081H |

AQMD Rule 1192 Compliant

**Heavy-Duty Engines**
**MY2000**

| | A | B | C | D | E | F | G | H | I | J | K | L | M | N | O | P | T |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | ARB Executive Order | Manufacturer | Engine Family | Max BHP | MAX RPM | CERT Type | Fuel Type | CERT FUEL | Service Class | ECS_TYPE | THC | NMHC | CO | NOx | Opt NOx Std | PM | MODELS |
| 3 | A-21-280-1 | Cummins | YCEXH0505CBJ | 275 | 2400 | DSL | NG | CNG | BUS | PCM,TC,CAC,OC,HO2S | | 0.2 | 0.6 | 1.7 | 2.5 | 0.01 | C8.3-275G |
| 4 | A-21-285 | Cummins | YCEXH0359BBL | 195 | 2800 | DSL | NG | LPG | BUS | PCM,TC,CAC,OC,HO2S | 0.8 | | 1 | 2.3 | 2.5 | 0.01 | B5.9-195 LPG |
| 5 | A-290-83 | DDC | YDDXH08.5FJG | 275 | 2100 | DSL | NG | CNG | BUS | TC,ECM,CAC | | 0.8 | 2.2 | 1.5 | 2.0 | 0.01 | CNG, LNG SERIES 50G |
| 6 | A-290-85 | DDC | YDDXH08.5FJF | 275 | 2100 | DSL | NG | CNG | BUS | TC,ECM,CAC | | 0.8 | 2.2 | 1.5 | | 0.01 | CNG, LNG SERIES 50G |
| 7 | A-21-283 | Cummins | YCEXH0505CBI | 275 | 2400 | DSL | NG | CNG | BUS | PCM,TC,CAC,OC,HO2S | | 0.6 | 0.9 | 1.837 | 2.5 | 0.02 | C8.3-275G, C8.3-250G |
| 8 | A-21-284 | Cummins | YCEXH0359BBK | 230 | 2800 | DSL | NG | CNG | BUS | PCM,TC,CAC,OC,HO2S | | 0.06 | 2.7 | 1.83 | 2.5 | 0.02 | B5.9-230G, B5.9-195, B5.9-150G |
| 9 | A-290-81 | DDC | YDDXH12.7FGF | 330 | 2100 | DSL | NG | CNG | BUS | TC,ECM,CAC | | 0.8 | 2 | 2 | | 0.02 | CNG, LNG SERIES 60G |
| 10 | A-290-84 | DDC | YDDXH12.7FGG | 330 | 2100 | DSL | NG | CNG | BUS | TC,ECM,CAC | | 0.8 | 2 | 2 | 2.5 | 0.02 | CNG, LNG SERIES 60G |
| 11 | A-290-87 | DDC | YDDXH12.7FGF | 330 | 2100 | DSL | NG | CNG | BUS | ECM | | 0.8 | 2 | 2 | | 0.02 | CNG, LPG SERIES 60G |
| 12 | A-21-287 | Cummins | YCEXH0505CBG | 275 | 2400 | DSL | NG | CNG | BUS | PCM,TC,CAC,HO2S | | 1.1 | 7.1 | 2.19 | | 0.07 | C8.3-275G, C8.3-250G |
| 13 | A-21-286 | Cummins | YCEXH0359BBJ | 230 | 2800 | DSL | NG | CNG | BUS | PCM,TC,CAC,HO2S | 0.1 | | 7.2 | 2.72 | | 0.08 | B5.9-230G, B5.9-195G, B5.9-150G |



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AQMD Rule 1193 Compliant

# Heavy-Duty Engines and Incomplete Vehicles
# MY2001

ARB Executive Order Data

## INCOMPLETE HEAVY-DUTY VEHICLES

| Vehicle Mfr | Engine Mfr | Exec Order | Fuel | Vehicle Class | Engine Family | Liter Disp | CID | Max HP | Torq | MODELS |
|---|---|---|---|---|---|---|---|---|---|---|
| Mack | Mack | A-27-82 | CNG/LNG | HHD | 1MKXH11.9G58 | 11.9 | 787 | 325 | 1050 | MR, LE, CH |
| IMPCO | IMPCO | A-328-19 | LPG | HDG2 | 1TJXH08.1502 | 8.1 | 496 | 276 | 395 | GMC/Chevrolet: C6500, C7500, C8500, B7500 |
| IMPCO | IMPCO | A-328-19-1 | LPG | HDG2 | 1TJXH08.1502 | 8.1 | 496 | 276 | 395 | GMC/Chevrolet: C6500, C7500, C8500, B7500 |
| IMPCO | IMPCO | A-328-21 | LPG | HDG2 | 1TJXH08.1505 | 8.1 | 496 | 276 | 395 | GMC/Chevrolet: C6500, C7500, C8500, B7500 |
| GFI | GFI | A-325-32 | LPG or Gaso | HDG2 | 1G9XH06.88CP | 6.8 | 417 | 310 | 425 | F-450, F-550 |
| Ford | Ford | A-10-983 | Gasoline | HDG2 | 1FMXH06.8CH5 | 6.8 | 417 | 305 | 425 | F-450, F-550 |
| Ford | Ford | A-10-985 | Gasoline | HDG2 | 1FMXH06.8CF5 | 6.8 | 417 | 305 | 420 | E-Series, E-350, E-450 |
| Ford | Ford | A-10-990 | Gasoline | HDG2 | 1FMXH05.4CF5 | 5.4 | 326 | 255 | 350 | E-Series, E-350 |
| GM | GM | A-6-979 | Gasoline | HDG2 | 1GMXH08.1513 | 8.1 | 496 | 340 | 455 | CK30 |
| GM | GM | A-6-1004 | Gasoline | HDG2 | 1GMXH08.1512 | 8.1 | 496 | 270 | 400 | B7, C6, C7 |
| GM | GM | A-6-1008 | Gasoline | HDG2 | 1GMXH08.1502 | 8.1 | 496 | 270 | 400 | B7, C6, C7 |

## HEAVY-DUTY ENGINES

| Engine Mfr | Exec Order | Fuel | Vehicle Class | Engine Family | Liter Disp | CID | Max HP | Torq | MODELS |
|---|---|---|---|---|---|---|---|---|---|
| Mack | A-27-81 | CNG/LNG | HHD | 1MKXH11.9G58 | 11.9 | 787 | 325 | 1050 | E7G325 |
| IMPCO | A-328-18 | LPG | HDG2 | 1TJXH08.1502 | 8.1 | 496 | 276 | 395 | L19LPG |
| IMPCO | A-328-20 | LPG | HDG2 | 1TJXH08.1505 | 8.1 | 496 | 276 | 395 | L18LPG |
| Ford | A-10-982 | Gasoline | HDG2 | 1FMXH06.8CH5 | 6.8 | 417 | 310 | 425 | F-Series |
| Ford | A-10-984 | Gasoline | HDG2 | 1FMXH06.8CF5 | 6.8 | 417 | 305 | 420 | E-Series |
| Ford | A-10-989 | Gasoline | HDG2 | 1FMXH05.4CF5 | 5.4 | 326 | 255 | 350 | E-Series |
| GFI | A-325-31 | Gasoline | HDG2 | 1G9XH06.88CP | 6.8 | 417 | 310 | 425 | V-10 GFP |
| GM | A-6-997 | Gasoline | HDG2 | 1GMXH05.7582 | 5.7 | 350 | 250 | 330 | L31 |
| GM | A-6-1001 | Gasoline | HDG2 | 1GMXH08.1502 | 8.1 | 496 | 270 | 400 | L18 |
| GM | A-6-1002 | Gasoline | HDG2 | 1GMXH08.1503 | 8.1 | 496 | 340 | 455 | L18 |
| GM | A-6-1003 | Gasoline | HDG2 | 1GMXH08.1512 | 8.1 | 496 | 270 | 400 | L18 |
| GM | A-6-1009 | Gasoline | HDG2 | 1GMXH08.1503 | 8.1 | 496 | 340 | 455 | CK30, P30 |
| GM | A-6-1016 | Gasoline | HDG2 | 1GMXH08.1513 | 8.1 | 496 | 340 | 455 | L18 |

AQMD Rule 1193 Compliant

**Heavy-Duty Engines**
**MY2000**

sorted by PM

| | A | B | C | D | E | F | G | H | I | J | K | L | M | N | O | P | T |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | ARB Executive Order | Manufacturer | Engine Family | Max BHP | MAX RPM | CERT Type | Fuel Type | CERT FUEL | Service Class | ECS_TYPE | THC | NMHC | CO | NOx | Opt NOx Std | PM | MODELS |
| 7 | A-118-21 | Deere | YJDXH08.1003 | 254 | 2200 | DSL | NG | CNG | MHD | ECM,TC,CAC,02S | - | 0.4 | 1.8 | 2.2 | 2.5 | 0.02 | 6081H |
| 13 | A-27-77 | Mack | YMKXH11.9G55 | 350 | 1800 | DSL | NG | CNG | HHD | O2S,ECM,TAA | 2.9 | 0.3 | 1.3 | 2.3 | 2.5 | 0.03 | E7G-350, E7G-325 |
| 14 | A-118-20 | Deere | YJDXH06.8004 | 239 | 2400 | DSL | NG | CNG | MHD | ECM,TC,CAC,02S | | 0.3 | 1.9 | 2.4 | 2.5 | 0.04 | T06068 |
| 15 | A-118-19 | Deere | YJDXH08.1001 | 250 | 2200 | DSL | NG | CNG | MHD | ECM,TC,CAC,02S | | 0.4 | 2.2 | 2.6 | | 0.05 | 6081H |
| 16 | A-326-13 | Power Systems | XPSXH0629E6J | 350 | 1800 | DSL | NG | CNG | HHD | ECM,CAC,TC,DI | | 1.1 | 7.4 | 2.4 | 2.5 | 0.06 | DUAL-FUEL C-10 (10.3L) |
| 17 | A-118-18 | Deere | YJDXH06.8002 | 229 | 2400 | DSL | NG | CNG | MHD | ECM,TC,02S | | 0.48 | 2.8 | 3.2 | | 0.07 | T06068 |
| 19 | A-326-12 | Power Systems | XPSXH0442E6L | 250 | 2200 | DSL | NG | CNG | HHD | ECM | | 1.2 | 6 | 2.2 | 2.5 | 0.07 | DUAL-FUEL 3126B (7.2L) |
| 21 | A-326-15 | Power Systems | XPSXH0442E6J | 250 | 2200 | DSL | NG | CNG | MHD | ECM,CAC,TC,DI | | 1.2 | 6 | 2.2 | 2.5 | 0.08 | DUAL-FUEL 3126B (7.2L) |
| 22 | A-326-14 | Power Systems | XPSXH0729E6J | 410 | 1900 | DSL | NG | CNG | HHD | ECM,CAC,TC,DI | | 0.5 | 4.1 | 2.4 | 2.5 | 0.102 | DUAL-FUEL C-12 (12.0L) |
| 23 | A-330-20 | Baytech | YBYTH04.3IUV | 118 | 3719 | OTT | NG | CNG | HDG | TBI,EGR,OC,HO2S,ECM | | 0.007 | 11 | 1.9 | | | 0E418N0500 |
| 24 | A-330-20 | Baytech | YBYTH04.3LEV | 122 | 3899 | OTT | NG | CNG | HDG | TBI,EGR,OC,HO2S,ECM | | 0.015 | 10.5 | 2.8 | | | 0F717N0500, 0F717E0500, 0F718Q0500, 0F728U0500 |
| 25 | A-10-911 | Ford | YFMXH06.8CF5 | 305 | 4250 | OTT | GAS | IND | HDG | TWC,SFI,2HO2S,HO2S | 0.153 | | 2.49 | 0.439 | | | OE414Y0505, 0E414N0A05 |
| 26 | A-10-915 | Ford | YFMXH06.8BHF | 310 | 4250 | OTT | GAS | IND | HDG | TWC,SFI,2HO2S,HO2S | 0.157 | | 2.6 | 0.407 | | | LB4 |
| 27 | A-10-920 | Ford | YFMXH05.4CF5 | 255 | 4500 | OTT | GAS | IND | HDG | TWC,SFI,2HO2S,HO2S | 0.12 | | 2.24 | 1.01 | | | LB4 |
| 28 | A-325-23 | GFI | YG9XH06.88CP | 310 | 4250 | OTT | GAS | IND | HDG | TWC,2HO2S,SFI | 0.1 | 0.1 | 2.4 | 0.5 | | | L31 |
| 29 | A-325-23 | GFI | YG9XH06.88CP | 310 | 4250 | OTT | LPG | LPG | HDG | TWC,2HO2S,SFI | 0.3 | 0.3 | 4.1 | 1.3 | | | L21 |
| 30 | A-328-13 | IMPCO | YTJXH07.4502 | 224 | 3700 | OTT | LPG | LPG | HDG | TWC,CARB,EGR,HO2S(2),PCM | 0.7 | 0.6 | 5.3 | 1.5 | | | L29 |
| 31 | A-328-16 | IMPCO | YTJXH07.4505 | 229 | 3700 | OTT | LPG | LPG | HDG | TWC,CARB,EGR,HO2S(2),PCM | 0.7 | | 20.6 | 0.8 | 1.5 | | V-10 GFP |
| 32 | A-330-10 | Baytech | YBYTH05.7ILV | 211 | 4476 | OTT | NG | CNG | HDG | EGR,2TWC,2HO2S(2),TBI,ECM,SFI | 1.4 | 0 | 5.9 | 1.3 | 1.5 | | V-10 GFP |
| 33 | A-330-12 | Baytech | YBYTH05.7LEV | 245 | 4412 | OTT | GAS | PH2 | HDG | EGR,2TWC,2HO2S(2),TBI,ECM,SFI | 0.3 | 0.2 | 1.5 | 1.3 | 1.5 | | L21 |
| 34 | A-330-12 | Baytech | YBYTH05.7LEV | 211 | 4476 | OTT | NG | CNG | HDG | EGR,2TWC,2HO2S(2),TBI,ECM,SFI | 1.4 | 0 | 5.9 | 1.3 | 1.5 | | L21 LPG |
| 35 | A-330-14 | Baytech | YBYTH05.7050 | 245 | 4412 | OTT | GAS | PH2 | HDG | EGR,2TWC,2HO2S(2),TBI,ECM,SFI | 0.3 | 0.2 | 1.5 | 1.3 | | | L31-CNG |
| 36 | A-330-14 | Baytech | YBYTH05.7050 | 211 | 4476 | OTT | NG | CNG | HDG | EGR,2TWC,2HO2S(2),TBI,ECM,SFI | 1.4 | 0 | 5.9 | 1.3 | | | L31-CNG, L31-GASOLINE |
| 37 | A-330-8 | Baytech | YBYTH05.7ULV | 245 | 4412 | OTT | GAS | PH2 | HDG | EGR,2TWC,2HO2S(2),TBI,ECM,SFI | 0.3 | 0.2 | 1.5 | 1.3 | 1.5 | | L31-CNG, L31-GASOLINE |
| 38 | A-330-8 | Baytech | YBYTH05.7ULV | 211 | 4476 | OTT | NG | CNG | HDG | EGR,2TWC,2HO2S(2),TBI,ECM,SFI | 1.4 | 0 | 5.9 | 1.3 | 1.5 | | L31-CNG, L31-GASOLINE |
| 39 | A-6-941 | GM | YGMXH05.7582 | 255 | 4600 | OTT | GAS | IND | HDG | 2TWC,SFI,EGR,2HO2S | 0.3 | | 4.9 | 2.4 | | | L31-CNG, L31-GASOLINE |
| 40 | A-6-946 | GM | YGMXH07.4502 | 270 | 3750 | OTT | GAS | IND | HDG | TWC,SFI,EGR,2HO2S | 0.6 | | 8.9 | 1.5 | | | L31-CNG, L31-GASOLINE |
| 41 | A-6-947 | GM | YGMXH07.4503 | 290 | 4000 | OTT | GAS | IND | HDG | 2TWC,SFI,EGR,2HO2S | 0.6 | | 11.1 | 3.9 | | | L31-CNG, L31-GASOLINE |



Received 5/5/2000

AQMD Rule 1194 Compliant

# Medium-Duty Engines and Incomplete Vehicles
# MY2001

ARB Exective Order Data

| INCOMPLETE MEDIUM-DUTY VEHICLES | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| Vehicle Manufacturer | Engine Mfr | Executive Order | Fuel | Engine Family | Liter Disp | CID | HP | Emis Std | MODELS |
| GFI | GFI | A-325-30 | LPG or Gaso | 1G9XH06.87CP | 6.8 | 417 | 310 | ULEV | F-350 (Ford evaporative control system) |
| | GFI | A-325-29 | LPG or Gaso | 1G9XH06.87CP | 6.8 | 417 | 310 | ULEV | V 10 GFP (Torque 425) |
| Ford | Ford | A-10-987 | Gasoline | 1FMXH06.8TH5 | 6.8 | 417 | 310 | ULEV | E-350: Commercial Cutaway, RV Cutaway, Commercial Stripped Chassis. E-Super Duty Cutaway. F-350 Reg Cab Sub Cab, Crew Cab. |
| Ford | Ford | A-10-992 | Gasoline | 1FMXH05.4TH5 | 5.4 | 326 | 255 | ULEV | E-Series, E-350. F-Series F-250HD, F-350 |

| MEDIUM-DUTY ENGINES | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Engine Mfr | Executive Order | Fuel | Engine Family | Liter Disp | CID | HP | Emis Std | MODELS |
| Ford | A-10-986 | Gasoline | 1FMXH06.8TH5 | 6.8 | 417 | 310 | ULEV | E series, F Series |
| Ford | A-10-991 | Gasoline | 1FMXH05.4TH5 | 5.4 | 326 | 255 | ULEV | E series, F Series |

AQMD Rule 1194 Compliant

**Medium-Duty Vehicles**
**MY2000**

sorted by Mfr.

| | A | B | C | D | E | F | G | H | I |
|---|---|---|---|---|---|---|---|---|---|
| 1 | MFR | ARB Exec Order | Engine Family | VEH CLS | EXH STD | EXH FUEL TYPE | EXH CERT FUEL | ECS TYPE | MODELS |
| 2 | CHRY | A-9-469 | YCRXT05.26RC | M3 | SULEV | DED | CNG | TWC,OC,SFI,2HO2S | CHRYSLER |
| 3 | FORD | A-10-907 | YFMXT05.4RP5 | M3 | SULEV | DED | CNG | 2TWC(2),TWC,2HO2S,SFI | FORD |
| 4 | FORD | A-10-908 | YFMXT05.4RP6 | M3 | SULEV | DED | CNG | 2TWC,TWC,2HO2S,SFI | FORD |
| 5 | CHRY | A-9-461 | YCRXA0287H41 | M2 | ULEV | DED | PH2 | 2HO2S(2),2WUOC,SFI,TWC | DODGE |
| 6 | GM | A-6-911 | YGMXA04.3189 | M2 | ULEV | DED | PH2 | SFI,EGR,TWC,2HO2S(2),HO2S, WU-TWC | CHEVROLET, GMC |



Received 12/1/99

AQMD Rule 1194 Compliant

# Heavy-Duty Engines and Incomplete Vehicles
## MY2001

ARB Executive Order Data

**INCOMPLETE HEAVY-DUTY VEHICLES**

| Vehicle Mfr | Engine Mfr | Exec Order | Fuel | Vehicle Class | Engine Family | Liter Disp | CID | Max HP | Torq | MODELS |
|---|---|---|---|---|---|---|---|---|---|---|
| IMPCO | IMPCO | A-328-19-1 | LPG | HDG2 | 1TJXH08.1502 | 8.1 | 496 | 276 | 395 | GMC/Chevrolet C6500, C7500, C8500, B7500 |
| IMPCO | IMPCO | A-328-21 | LPG | HDG2 | 1TJXH08.1505 | 8.1 | 496 | 276 | 395 | GMC/Chevrolet C6500, C7500, C8500, B7500 |
| GFI | GFI | A-325-32 | LPG or Gaso | HDG2 | 1G9XH06.88CP | 6.8 | 417 | 310 | 425 | F-450, F-550 |

**HEAVY-DUTY ENGINES**

| Engine Mfr | Exec Order | Fuel | Vehicle Class | Engine Family | Liter Disp | CID | Max HP | Torq | MODELS |
|---|---|---|---|---|---|---|---|---|---|
| Deere | A-108-22 | CNG | Urban Bus | 1JDXH08.1001 | 8.1 | 497 | 280 | 900 | 6081H |
| IMPCO | A-328-18 | LPG | HDG2 | 1TJXH08.1502 | 8.1 | 496 | 276 | 395 | L19LPG |
| IMPCO | A-328-20 | LPG | HDG2 | 1TJXH08.1505 | 8.1 | 496 | 276 | 395 | L18LPG |

| | A | B | C | D | E | F | G | H | I | J | K | L | M | N | O | P | T |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | ARB Executive Order | Manufacturer | Engine Family | Max BHP | MAX RPM | CERT Type | Fuel Type | CERT FUEL | Service Class | ECS_TYPE | THC | NMHC | CO | NOx | Opt NOx Std | PM | MODELS |
| 3 | A-21-280-1 | Cummins | YCEXH0505CBJ | 275 | 2400 | DSL | NG | CNG | BUS | PCM,TC,CAC,OC,HO2S | | 0.2 | 0.6 | 1.7 | 2.5 | 0.01 | C8.3-275G |
| 4 | A-21-285 | Cummins | YCEXH0359BBL | 195 | 2600 | DSL | NG | LPG | BUS | PCM,TC,CAC,OC,HO2S | 0.8 | | 1 | 2.3 | 2.5 | 0.01 | B5.9-195 LPG |
| 5 | A-290-83 | DDC | YDDXH08.5FJG | 275 | 2100 | DSL | NG | CNG | BUS | TC,ECM,CAC | | 0.8 | 2.2 | 1.5 | 2.0 | 0.01 | CNG, LNG SERIES 50G |
| 6 | A-290-85 | DDC | YDDXH08.5FJF | 275 | 2100 | DSL | NG | CNG | BUS | TC,ECM,CAC | | 0.8 | 2.2 | 1.5 | | 0.01 | CNG, LNG SERIES 50G |
| 7 | A-118-21 | Deere | YJDXH08.1003 | 254 | 2200 | DSL | NG | CNG | MHD | ECM,TC,CAC,02S | | 0.4 | 1.8 | 2.2 | 2.5 | 0.02 | 6081H |
| 8 | A-21-283 | Cummins | YCEXH0505CBI | 275 | 2400 | DSL | NG | CNG | BUS | PCM,TC,CAC,OC,HO2S | | 0.6 | 0.9 | 1.837 | 2.5 | 0.02 | C8.3-275G, C8.3-250G |
| 9 | A-21-284 | Cummins | YCEXH0359BBK | 230 | 2600 | DSL | NG | CNG | BUS | PCM,TC,CAC,OC,HO2S | | 0.06 | 2.7 | 1.83 | 2.5 | 0.02 | B5.9-230G, B5.9-195, B5.9-150G |
| 10 | A-290-81 | DDC | YDDXH12.7FGF | 330 | 2100 | DSL | NG | CNG | BUS | TC,ECM,CAC | | 0.8 | 2 | 2 | | 0.02 | CNG, LNG SERIES 60G |
| 11 | A-290-84 | DDC | YDDXH12.7FGG | 330 | 2100 | DSL | NG | CNG | BUS | TC,ECM,CAC | | 0.8 | 2 | 2 | 2.5 | 0.02 | CNG, LNG SERIES 60G |
| 12 | A-290-87 | DDC | YDDXH12.7FGF | 330 | 2100 | DSL | NG | CNG | BUS | ECM | | 0.8 | 2 | 2 | | 0.02 | CNG, LPG SERIES 60G |
| 14 | A-118-20 | Deere | YJDXH06.8004 | 239 | 2400 | DSL | NG | CNG | MHD | ECM,TC,CAC,02S | | 0.3 | 1.9 | 2.4 | 2.5 | 0.04 | T06068 |
| 15 | A-118-19 | Deere | YJDXH08.1001 | 250 | 2200 | DSL | NG | CNG | MHD | ECM,TC,CAC,02S | | 0.4 | 2.2 | 2.6 | | 0.05 | 6081H |
| 17 | A-118-18 | Deere | YJDXH06.8002 | 229 | 2400 | DSL | NG | CNG | MHD | ECM,TC,02S | | 0.48 | 2.8 | 3.2 | | 0.07 | T06068 |
| 18 | A-21-287 | Cummins | YCEXH0505CBG | 275 | 2400 | DSL | NG | CNG | BUS | PCM,TC,CAC,HO2S | | 1.1 | 7.1 | 2.19 | | 0.07 | C8.3-275G, C8.3-250G |
| 20 | A-21-286 | Cummins | YCEXH0359BBJ | 230 | 2600 | DSL | NG | CNG | BUS | PCM,TC,CAC,HO2S | 0.1 | | 7.2 | 2.72 | | 0.08 | B5.9-230G, B5.9-195G, B5.9-150G |
| 21 | A-326-15 | Power Systems | XPSXH0442E6J | 250 | 2200 | DSL | NG | CNG | MHD | ECM,CAC,TC,DI | | 1.2 | 6 | 2.2 | 2.5 | 0.08 | DUAL-FUEL 3126B (7.2L) |
| 23 | A-330-20 | Baytech | YBYTH04.3IUV | 118 | 3719 | OTT | NG | CNG | HDG | TBI,EGR,OC,HO2S,ECM | | 0.007 | 11 | 1.9 | | | 0E418N0500 |
| 24 | A-330-20 | Baytech | YBYTH04.3LEV | 122 | 3899 | OTT | NG | CNG | HDG | TBI,EGR,OC,HO2S,ECM | | 0.015 | 10.5 | 2.8 | | | 0F717N0500, 0F717E0500, 0F718Q0500, 0F728U0500 |
| 29 | A-325-23 | GFI | YG9XH08.88CP | 310 | 4250 | OTT | LPG | LPG | HDG | TWC,2HO2S,SFI | 0.3 | 0.3 | 4.1 | 1.3 | | | L21 |
| 30 | A-328-13 | IMPCO | YTJXH07.4502 | 224 | 3700 | OTT | LPG | LPG | HDG | TWC,CARB,EGR,HO2S(2),PCM | 0.7 | 0.6 | 5.3 | 1.5 | | | L29 |
| 31 | A-328-16 | IMPCO | YTJXH07.4505 | 229 | 3700 | OTT | LPG | LPG | HDG | TWC,CARB,EGR,HO2S(2),PCM | 0.7 | | 20.6 | 0.8 | 1.5 | | V-10 GFP |
| 32 | A-330-10 | Baytech | YBYTH05.7ILV | 211 | 4476 | OTT | NG | CNG | HDG | EGR,2TWC,2HO2S(2),TBI,ECM,SFI | 1.4 | 0 | 5.9 | 1.3 | 1.5 | | V-10 GFP |
| 34 | A-330-12 | Baytech | YBYTH05.7LEV | 211 | 4476 | OTT | NG | CNG | HDG | EGR,2TWC,2HO2S(2),TBI,ECM,SFI | 1.4 | 0 | 5.9 | 1.3 | 1.5 | | L21 LPG |
| 35 | A-330-14 | Baytech | YBYTH05.7050 | 245 | 4412 | OTT | GAS | PH2 | HDG | EGR,2TWC,2HO2S(2),TBI,ECM,SFI | 0.3 | 0.2 | 1.5 | 1.3 | | | L31-CNG |
| 36 | A-330-14 | Baytech | YBYTH05.7050 | 211 | 4476 | OTT | NG | CNG | HDG | EGR,2TWC,2HO2S(2),TBI,ECM,SFI | 1.4 | 0 | 5.9 | 1.3 | | | L31-CNG, L31-GASOLINE |
| 37 | A-330-8 | Baytech | YBYTH05.7ULV | 245 | 4412 | OTT | GAS | PH2 | HDG | EGR,2TWC,2HO2S(2),TBI,ECM,SFI | 0.3 | 0.2 | 1.5 | 1.3 | 1.5 | | L31-CNG, L31-GASOLINE |
| 38 | A-330-8 | Baytech | YBYTH05.7ULV | 211 | 4476 | OTT | NG | CNG | HDG | EGR,2TWC,2HO2S(2),TBI,ECM,SFI | 1.4 | 0 | 5.9 | 1.3 | 1.5 | | L31-CNG, L31-GASOLINE |
| 39 | A-6-941 | GM | YGMXH05.7582 | 255 | 4600 | OTT | GAS | IND | HDG | 2TWC,SFI,EGR,2HO2S | 0.3 | | 4.9 | 2.4 | | | L31-CNG, L31-GASOLINE |
| 40 | A-6-946 | GM | YGMXH07.4502 | 270 | 3750 | OTT | GAS | IND | HDG | TWC,SFI,EGR,2HO2S | 0.6 | | 8.9 | 1.5 | | | L31-CNG, L31-GASOLINE |
| 41 | A-6-947 | GM | YGMXH07.4503 | 290 | 4000 | OTT | GAS | IND | HDG | 2TWC,SFI,EGR,2HO2S | 0.6 | | 11.1 | 3.9 | | | L31-CNG, L31-GASOLINE |

AQMD Rule 1186.1 Compliant

# Heavy-Duty Engines and Incomplete Vehicles
## MY2001

ARB Executive Order Data

**INCOMPLETE HEAVY-DUTY VEHICLES**

| Vehicle Mfr | Engine Mfr | Exec Order | Fuel | Vehicle Class | Engine Family | Liter Disp | CID | Max HP | Torq | MODELS |
|---|---|---|---|---|---|---|---|---|---|---|
| IMPCO | IMPCO | A-328-19 | LPG | HDG2 | 1TJXH08.1502 | 8.1 | 496 | 276 | 395 | GMC/Chevrolet C6500, C7500, C8500, B7500 |
| IMPCO | IMPCO | A-328-19-1 | LPG | HDG2 | 1TJXH08.1502 | 8.1 | 496 | 276 | 395 | GMC/Chevrolet C6500, C7500, C8500, B7500 |
| IMPCO | IMPCO | A-328-21 | LPG | HDG2 | 1TJXH08.1505 | 8.1 | 496 | 276 | 395 | GMC/Chevrolet C6500, C7500, C8500, B7500 |
| GFI | GFI | A-325-32 | LPG or Gaso | HDG2 | 1G9XH06.88CP | 6.8 | 417 | 310 | 425 | F-450, F-550 |

**HEAVY-DUTY ENGINES**

| Engine Mfr | Exec Order | Fuel | Vehicle Class | Engine Family | Liter Disp | CID | Max HP | Torq | MODELS |
|---|---|---|---|---|---|---|---|---|---|
| IMPCO | A-328-18 | LPG | HDG2 | 1TJXH08.1502 | 8.1 | 496 | 276 | 395 | L19LPG |
| IMPCO | A-328-20 | LPG | HDG2 | 1TJXH08.1505 | 8.1 | 496 | 276 | 395 | L18LPG |

AQMD Rule 1186.1 Compliant

**Heavy-Duty Engines**
**MY2000**

sorted by PM

| | A | B | C | D | E | F | G | H | I | J | K | L | M | N | O | P | T |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | ARB Executive Order | Manufacturer | Engine Family | Max BHP | MAX RPM | CERT Type | Fuel Type | CERT FUEL | Service Class | EC3_TYPE | THC | NMHC | CO | NOx | Opt NOx Std | PM | MODELS |
| 7 | A-118-21 | Deere | YJDXH08.1003 | 254 | 2200 | DSL | NG | CNG | MHD | ECM,TC,CAC,02S | | 0 4 | 1 8 | 2 2 | 2 5 | 0 02 | 6081H |
| 14 | A-118-20 | Deere | YJDXH06.8004 | 239 | 2400 | DSL | NG | CNG | MHD | ECM,TC,CAC,02S | | 0 3 | 1 9 | 2 4 | 2 5 | 0.04 | T06068 |
| 15 | A-118-19 | Deere | YJDXH08.1001 | 250 | 2200 | DSL | NG | CNG | MHD | ECM,TC,CAC,02S | | 0 4 | 2 2 | 2 8 | | 0 05 | 6081H |
| 17 | A-118-18 | Deere | YJDXH06.8002 | 229 | 2400 | DSL | NG | CNG | MHD | ECM,TC,02S | | 0 48 | 2 8 | 3 2 | | 0 07 | T06068 |
| 21 | A-326-15 | Power Systems | XPSXH0442E6J | 250 | 2200 | DSL | NG | CNG | MHD | ECM,CAC,TC,DI | | 1 2 | 6 | 2 2 | 2 5 | 0 08 | DUAL-FUEL 3126B (7.2L) |
| 23 | A-330-20 | Baytech | YBYTH04.3IUV | 118 | 3719 | OTT | NG | CNG | HDG | TBI,EGR,OC,HO2S,ECM | | 0 007 | 11 | 1 9 | | | 0E418N0500 |
| 24 | A-330-20 | Baytech | YBYTH04.3LEV | 122 | 3899 | OTT | NG | CNG | HDG | TBI,EGR,OC,HO2S,ECM | | 0 015 | 10 5 | 2 8 | | | 0F717N0500, 0F717E0500, 0F718Q0500, 0F728U0500 |
| 29 | A-325-23 | GFI | YG9XH06.88CP | 310 | 4250 | OTT | LPG | LPG | HDG | TWC,2HO2S,SFI | 0 3 | 0 3 | 4 1 | 1 3 | | | L21 |
| 30 | A-328-13 | IMPCO | YTJXH07.4502 | 224 | 3700 | OTT | LPG | LPG | HDG | TWC,CARB,EGR,HO2S(2),PCM | 0 7 | 0 6 | 5 3 | 1 5 | | | L29 |
| 31 | A-328-16 | IMPCO | YTJXH07.4505 | 229 | 3700 | OTT | LPG | LPG | HDG | TWC,CARB,EGR,HO2S(2),PCM | 0 7 | | 20 6 | 0 8 | 1 5 | | V-10 GFP |
| 32 | A-330-10 | Baytech | YBYTH05.7ILV | 211 | 4476 | OTT | NG | CNG | HDG | EGR,2TWC,2HO2S(2),TBI,ECM,SFI | 1 4 | 0 | 5 9 | 1 3 | 1 5 | | V-10 GFP |
| 34 | A-330-12 | Baytech | YBYTH05.7LEV | 211 | 4476 | OTT | NG | CNG | HDG | EGR,2TWC,2HO2S(2),TBI,ECM,SFI | 1 4 | 0 | 5 9 | 1 3 | 1 5 | | L21 LPG |
| 36 | A-330-14 | Baytech | YBYTH05.7050 | 211 | 4476 | OTT | NG | CNG | HDG | EGR,2TWC,2HO2S(2),TBI,ECM,SFI | 1 4 | 0 | 5 9 | 1 3 | | | L31-CNG, L31-GASOLINE |
| 38 | A-330-8 | Baytech | YBYTH05.7ULV | 211 | 4476 | OTT | NG | CNG | HDG | EGR,2TWC,2HO2S(2),TBI,ECM,SFI | 1 4 | 0 | 5 9 | 1 3 | 1 5 | | L31-CNG, L31-GASOLINE |



Received 5/5/2000

AQMD Rule 1196 Compliant

# Heavy-Duty Engines and Incomplete Vehicles
## MY2001

ARB Executive Order Data

### INCOMPLETE HEAVY-DUTY VEHICLES

| Vehicle Mfr | Engine Mfr | Exec Order | Fuel | Vehicle Class | Engine Family | Liter Disp | CID | Max HP | Torq | MODELS |
|---|---|---|---|---|---|---|---|---|---|---|
| Mack | Mack | A-27-82 | CNG/LNG | HHD | 1MKXH11.9G58 | 11.9 | 787 | 325 | 1050 | MR, LE, CH |
| IMPCO | IMPCO | A-328-19 | LPG | HDG2 | 1TJXH08.1502 | 8.1 | 496 | 276 | 395 | GMC/Chevrolet C6500, C7500, C8500, B7500 |
| IMPCO | IMPCO | A-328-19-1 | LPG | HDG2 | 1TJXH08.1502 | 8.1 | 496 | 276 | 395 | GMC/Chevrolet C6500, C7500, C8500, B7500 |
| IMPCO | IMPCO | A-328-21 | LPG | HDG2 | 1TJXH08.1505 | 8.1 | 496 | 276 | 395 | GMC/Chevrolet C6500, C7500, C8500, B7500 |
| GFI | GFI | A-325-32 | LPG or Gaso | HDG2 | 1G9XH06.88CP | 6.8 | 417 | 310 | 425 | F-450, F-550 |
| Ford | Ford | A-10-983 | Gasoline | HDG2 | 1FMXH06.8CH5 | 6.8 | 417 | 305 | 425 | F-450, F-550 |
| Ford | Ford | A-10-985 | Gasoline | HDG2 | 1FMXH06.8CF5 | 6.8 | 417 | 305 | 420 | E-Series, E-350, E-450 |
| Ford | Ford | A-10-990 | Gasoline | HDG2 | 1FMXH05.4CF5 | 5.4 | 326 | 255 | 350 | E-Series, E-350 |
| GM | GM | A-6-979 | Gasoline | HDG2 | 1GMXH08.1513 | 8.1 | 496 | 340 | 455 | CK30 |
| GM | GM | A-6-1004 | Gasoline | HDG2 | 1GMXH08.1512 | 8.1 | 496 | 270 | 400 | B7, C6, C7 |
| GM | GM | A-6-1008 | Gasoline | HDG2 | 1GMXH08.1502 | 8.1 | 496 | 270 | 400 | B7, C6, C7 |

### HEAVY-DUTY ENGINES

| Engine Mfr | Exec Order | Fuel | Vehicle Class | Engine Family | Liter Disp | CID | Max HP | Torq | MODELS |
|---|---|---|---|---|---|---|---|---|---|
| Mack | A-27-81 | CNG/LNG | HHD | 1MKXH11.9G58 | 11.9 | 787 | 325 | 1050 | E7G325 |
| Deere | A-108-22 | CNG | Urban Bus | 1JDXH08.1001 | 8.1 | 497 | 280 | 900 | 6081H |
| IMPCO | A-328-18 | LPG | HDG2 | 1TJXH08.1502 | 8.1 | 496 | 276 | 395 | L19LPG |
| IMPCO | A-328-20 | LPG | HDG2 | 1TJXH08.1505 | 8.1 | 496 | 276 | 395 | L18LPG |
| Ford | A-10-982 | Gasoline | HDG2 | 1FMXH06.8CH5 | 6.8 | 417 | 310 | 425 | F-Series |
| Ford | A-10-984 | Gasoline | HDG2 | 1FMXH06.8CF5 | 6.8 | 417 | 305 | 420 | E-Series |
| Ford | A-10-989 | Gasoline | HDG2 | 1FMXH05.4CF5 | 5.4 | 326 | 255 | 350 | E-Series |
| GFI | A-325-31 | Gasoline | HDG2 | 1G9XH06.88CP | 6.8 | 417 | 310 | 425 | V-10 GFP |
| GM | A-6-997 | Gasoline | HDG2 | 1GMXH05.7582 | 5.7 | 350 | 250 | 330 | L31 |
| GM | A-6-1001 | Gasoline | HDG2 | 1GMXH08.1502 | 8.1 | 496 | 270 | 400 | L18 |
| GM | A-6-1002 | Gasoline | HDG2 | 1GMXH08.1503 | 8.1 | 496 | 340 | 455 | L18 |
| GM | A-6-1003 | Gasoline | HDG2 | 1GMXH08.1512 | 8.1 | 496 | 270 | 400 | L18 |
| GM | A-6-1009 | Gasoline | HDG2 | 1GMXH08.1503 | 8.1 | 496 | 340 | 455 | CK30, P30 |
| GM | A-6-1016 | Gasoline | HDG2 | 1GMXH08.1513 | 8.1 | 496 | 340 | 455 | L18 |

AQMD Rule 1196 Compliant

**Heavy-Duty Engines**
**MY2000**

sorted by PM

| | A | B | C | D | E | F | G | H | I | J | K | L | M | N | O | P | T |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | ARB Executive Order | Manufacturer | Engine Family | Max BHP | MAX RPM | CERT Type | Fuel Type | CERT FUEL | Service Class | ECS_TYPE | THC | NMHC | CO | NOx | Opt NOx Std | PM | MODELS |
| 3 | A-21-280-1 | Cummins | YCEXH0505CBJ | 275 | 2400 | DSL | NG | CNG | BUS | PCM,TC,CAC,OC,HO2S | | 0 2 | 0 6 | 1 7 | 2 5 | 0.01 | C8.3-275G |
| 4 | A-21-285 | Cummins | YCEXH0359BBL | 195 | 2800 | DSL | NG | LPG | BUS | PCM,TC,CAC,OC,HO2S | 0 8 | | 1 | 2 3 | 2 5 | 0.01 | B5.9-195 LPG |
| 5 | A-290-83 | DDC | YDDXH08.5FJG | 275 | 2100 | DSL | NG | CNG | BUS | TC,ECM,CAC | | 0 8 | 2 2 | 1 5 | 2 0 | 0.01 | CNG, LNG SERIES 50G |
| 6 | A-290-85 | DDC | YDDXH08.5FJF | 275 | 2100 | DSL | NG | CNG | BUS | TC,ECM,CAC | | 0 8 | 2 2 | 1 5 | | 0.01 | CNG, LNG SERIES 50G |
| 7 | A-118-21 | Deere | YJDXH08.1003 | 254 | 2200 | DSL | NG | CNG | MHD | ECM,TC,CAC,02S | | 0 4 | 1 8 | 2 2 | 2 5 | 0.02 | 6081H |
| 8 | A-21-283 | Cummins | YCEXH0505CBI | 275 | 2400 | DSL | NG | CNG | BUS | PCM,TC,CAC,OC,HO2S | | 0 6 | 0 9 | 1 837 | 2 5 | 0.02 | C8.3-275G, C8.3-250G |
| 9 | A-21-284 | Cummins | YCEXH0359BBK | 230 | 2800 | DSL | NG | CNG | BUS | PCM,TC,CAC,OC,HO2S | | 0 06 | 2 7 | 1 83 | 2 5 | 0.02 | B5.9-230G, B5.9-195, B5.9-150G |
| 10 | A-290-81 | DDC | YDDXH12.7FGF | 330 | 2100 | DSL | NG | CNG | BUS | TC,ECM,CAC | | 0 8 | 2 | 2 | | 0.02 | CNG, LNG SERIES 60G |
| 11 | A-290-84 | DDC | YDDXH12.7FGG | 330 | 2100 | DSL | NG | CNG | BUS | TC,ECM,CAC | | 0 8 | 2 | 2 | 2 5 | 0.02 | CNG, LNG SERIES 60G |
| 12 | A-290-87 | DDC | YDDXH12.7FGF | 330 | 2100 | DSL | NG | CNG | BUS | ECM | | 0 8 | 2 | 2 | | 0.02 | CNG, LPG SERIES 60G |
| 13 | A-27-77 | Mack | YMKXH11.9G55 | 350 | 1800 | DSL | NG | CNG | HHD | O2S,ECM,TAA | 2 9 | 0 3 | 1 3 | 2 3 | 2 5 | 0.03 | E7G-350, E7G-325 |
| 14 | A-118-20 | Deere | YJDXH06.8004 | 239 | 2400 | DSL | NG | CNG | MHD | ECM,TC,CAC,C2S | | 0 3 | 1 9 | 2 4 | 2 5 | 0.04 | T06068 |
| 15 | A-118-19 | Deere | YJDXH08.1001 | 250 | 2200 | DSL | NG | CNG | MHD | ECM,TC,CAC,C2S | | 0 4 | 2 2 | 2 6 | | 0.05 | 6081H |
| 16 | A-326-13 | Power Systems | XPSXH0629E6J | 350 | 1800 | DSL | NG | CNG | HHD | ECM,CAC,TC,DI | | 1 1 | 7 4 | 2 4 | 2 5 | 0.06 | DUAL-FUEL C-10 (10.3L) |
| 17 | A-118-18 | Deere | YJDXH06.8002 | 229 | 2400 | DSL | NG | CNG | MHD | ECM,TC,02S | | 0 48 | 2 8 | 3 2 | | 0.07 | T06068 |
| 18 | A-21-287 | Cummins | YCEXH0505CBG | 275 | 2400 | DSL | NG | CNG | BUS | PCM,TC,CAC,HO2S | | 1 1 | 7 1 | 2 19 | | 0.07 | C8.3-275G, C8.3-250G |
| 19 | A-326-12 | Power Systems | XPSXH0442E6L | 250 | 2200 | DSL | NG | CNG | HHD | ECM | | 1 2 | 6 | 2 2 | 2 5 | 0.07 | DUAL-FUEL 3126B (7.2L) |
| 20 | A-21-286 | Cummins | YCEXH0359BBJ | 230 | 2800 | DSL | NG | CNG | BUS | PCM,TC,CAC,HO2S | 0 1 | | 7 2 | 2 72 | | 0.08 | B5.9-230G, B5.9-195G, B5.9-150G |
| 21 | A-326-15 | Power Systems | XPSXH0442E6J | 250 | 2200 | DSL | NG | CNG | MHD | ECM,CAC,TC,DI | | 1 2 | 6 | 2 2 | 2 5 | 0.08 | DUAL-FUEL 3126B (7.2L) |
| 22 | A-326-14 | Power Systems | XPSXH0729E6J | 410 | 1900 | DSL | NG | CNG | HHD | ECM,CAC,TC,DI | | 0 5 | 4 1 | 2 4 | 2 5 | 0.102 | DUAL-FUEL C-12 (12.0L) |
| 23 | A-330-20 | Baytech | YBYTH04.3IUV | 118 | 3719 | OTT | NG | CNG | HDG | TBI,EGR,OC,HO2S,ECM | | 0 007 | 11 | 1 9 | | | 0E418N0500 |
| 24 | A-330-20 | Baytech | YBYTH04.3LEV | 122 | 3899 | OTT | NG | CNG | HDG | TBI,EGR,OC,HO2S,ECM | | 0 015 | 10 5 | 2 8 | | | 0F717N0500, 0F717E0500, 0F718Q0500, 0F728U0500 |
| 25 | A-10-911 | Ford | YFMXH06.8CF5 | 305 | 4250 | OTT | GAS | IND | HDG | TWC,SFI,2HO2S,HO2S | 0 153 | | 2 49 | 0 439 | | | OE414Y0505, 0E414N0A05 |
| 26 | A-10-915 | Ford | YFMXH06.8BHF | 310 | 4250 | OTT | GAS | IND | HDG | TWC,SFI,2HO2S,HO2S | 0 157 | | 2 6 | 0 407 | | | LB4 |
| 27 | A-10-920 | Ford | YFMXH05.4CF5 | 255 | 4500 | OTT | GAS | IND | HDG | TWC,SFI,2HO2S,HO2S | 0 12 | | 2 24 | 1 01 | | | LB4 |
| 28 | A-325-23 | GFI | YG9XH06.88CP | 310 | 4250 | OTT | GAS | IND | HDG | TWC,2HO2S,SFI | 0 1 | 0 1 | 2 4 | 0 5 | | | L31 |
| 29 | A-325-23 | GFI | YG9XH06.88CP | 310 | 4250 | OTT | LPG | LPG | HDG | TWC,2HO2S,SFI | 0 3 | 0 3 | 4 1 | 1 3 | | | L21 |
| 30 | A-328-13 | IMPCO | YTJXH07.4502 | 224 | 3700 | OTT | LPG | LPG | HDG | TWC,CARB,EGR,HO2S(2),PCM | 0 7 | 0 6 | 5 3 | 1 5 | | | L29 |
| 31 | A-328-16 | IMPCO | YTJXH07.4505 | 229 | 3700 | OTT | LPG | LPG | HDG | TWC,CARB,EGR,HO2S(2),PCM | 0 7 | | 20 6 | 0 6 | 1 5 | | V-10 GFP |
| 32 | A-330-10 | Baytech | YBYTH05.7ILV | 211 | 4476 | OTT | NG | CNG | HDG | EGR,2TWC,2HO2S(2),TBI,ECM,SFI | 1.4 | 0 | 5 9 | 1 3 | 1 5 | | V-10 GFP |
| 33 | A-330-12 | Baytech | YBYTH05.7LEV | 245 | 4412 | OTT | GAS | PH2 | HDG | EGR,2TWC,2HO2S(2),TBI,ECM,SFI | 0.3 | 0 2 | 1 5 | 1 3 | 1 5 | | L21 |
| 34 | A-330-12 | Baytech | YBYTH05.7LEV | 211 | 4476 | OTT | NG | CNG | HDG | EGR,2TWC,2HO2S(2),TBI,ECM,SFI | 1.4 | 0 | 5 9 | 1 3 | 1 5 | | L21 LPG |
| 35 | A-330-14 | Baytech | YBYTH05.7050 | 245 | 4412 | OTT | GAS | PH2 | HDG | EGR,2TWC,2HO2S(2),TBI,ECM,SFI | 0.3 | 0 2 | 1 5 | 1 3 | | | L31-CNG |
| 36 | A-330-14 | Baytech | YBYTH05.7050 | 211 | 4476 | OTT | NG | CNG | HDG | EGR,2TWC,2HO2S(2),TBI,ECM,SFI | 1.4 | 0 | 5 9 | 1 3 | | | L31-CNG, L31-GASOLINE |
| 37 | A-330-8 | Baytech | YBYTH05.7ULV | 245 | 4412 | OTT | GAS | PH2 | HDG | EGR,2TWC,2HO2S(2),TBI,ECM,SFI | 0.3 | 0 2 | 1 5 | 1 3 | 1 5 | | L31-CNG, L31-GASOLINE |
| 38 | A-330-8 | Baytech | YBYTH05.7ULV | 211 | 4476 | OTT | NG | CNG | HDG | EGR,2TWC,2HO2S(2),TBI,ECM,SFI | 1.4 | 0 | 5 9 | 1 3 | 1 5 | | L31-CNG, L31-GASOLINE |
| 39 | A-8-941 | GM | YGMXH05.7582 | 255 | 4600 | OTT | GAS | IND | HDG | 2TWC,SFI,EGR,2HO2S | 0.3 | | 4 9 | 2 4 | | | L31-CNG, L31-GASOLINE |
| 40 | A-8-946 | GM | YGMXH07.4502 | 270 | 3750 | OTT | GAS | IND | HDG | TWC,SFI,EGR,2HO2S | 0.6 | | 8 9 | 1 5 | | | L31-CNG, L31-GASOLINE |
| 41 | A-8-947 | GM | YGMXH07.4503 | 290 | 4000 | OTT | GAS | IND | HDG | 2TWC,SFI,EGR,2HO2S | 0 6 | | 11 1 | 3 9 | | | L31-CNG, L31-GASOLINE |



Received 5/5/2000

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA,
WESTERN DIVISION

ENGINE MANUFACTURERS ASSOCIATION,

Plaintiff,

vs.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT ("SCAQMD"), et al.,

Defendants.

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NATURAL RESOURCES DEFENSE COUNCIL, INC.; COALITION FOR CLEAN AIR, INC.; COMMUNITIES FOR A BETTER ENVIRONMENT, INC.; PLANNING AND CONSERVATION LEAGUE; and SIERRA CLUB,

Defendants-in-Intervention.

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WESTERN STATES PETROLEUM ASSOCIATION,

Plaintiff-in-Intervention.

CASE NO. 00-09065 FMC (BQRx)

**DECLARATION OF DAVID R. COEL IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BY DEFENDANT SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT**

**[FRCP 56(b)]**

Date: May 21, 2001
Time: 10:00 a.m.
Courtroom: 750

1. The following matters are within my personal knowledge. I would testify as follows if called on to do so.

2. I am Program Supervisor in the Fleet Rules Implementation Unit of the South Coast Air Quality Management District. My principal job duty is to provide technical information for use in rule development



and implementation of the District's Fleet Rules. I have [sic] Bachelor of Science degree in Chemical Engineering from California Polytechnic State University, Pomona. I am a registered Professional Engineer in the State of California.

3. As part of my work on the Fleet Rules, I have researched specific vehicles and engines that are available for fleet operators to use to comply with the Fleet Rules. Since the fall of 1999, I have had numerous discussions with vehicle and engine manufactures and officials with the California Air Resources Board regarding the availability of complaint vehicles. Also, I have obtained written product information regarding compliant vehicles from engine manufacturers and state regulatory officials. Finally, I have conducted numerous conversations, by telephone and in person, with vehicle operators regarding the vehicles [sic] are likely to purchase to comply with the Fleet Rules.

4. I have reviewed the list of member companies of the Engine Manufacturers Association listed on the EMA website at www.engine-manufacturers.org/about/members.cfn. A true and correct copy of the webpage with the listing of EMA members is attached hereto as Exhibit "A."

5. Based on my research conducted during development of the fleet rules, it is my opinion that for the medium and heavy duty vehicle classes, the vehicles and engines that are available for fleet operators to purchase to comply with the Fleet Rules, and that fleet operators are likely to purchase to comply with the Fleet Rules, are manufactured by EMA member companies.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 18th day of April, 2001, at Diamond Bar, California.

/s/ David R. Coel
David R. Coel, Declarant

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**EXHIBIT TO DECLARATION OF DAVID R. COEL**

**Engine Manufacturers Association**

**Member Companies**

**HOME**
**About EMA**
**Recommended Guidelines**
**Newsroom**
**Members Only**
**EMA Internet Resources**

Briggs & Stratton Corporation
Caterpillar, Inc.
Cummins Engine Company
DaimlerChrysler Corporation
DaimlerChrysler AG Power Train Business Unit
Deere & Company
Detroit Diesel Corporation
Deutz Corporation
Ford Motor Corporation
General Electric Company
General Motors Corporation
Hino Motors, Ltd.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Kohler Company
Komatsu Ltd.
Kubota Tractor Corporation
Mack Trucks, Inc.
MerCruiser



Mitsubishi Engine North America, Inc.
Mitsubishi Fuso Truck of America, Inc.
New Holland North America, Inc.
Onan Corporation
Robin America, Inc.
Scania CV AB
Tecumseh Products Company
Volkswagen of America, Inc.
Volvo Truck Corporation
Waukesha Engine Division
Yamaha Motor Corporation
Yanmar Diesel America Corporation

**Engine Manufacturers Association**
**Two North LaSalle Street, Suite 2200**
**Chicago, IL 60602**
**Phone: (312) 827-8700**
**Fax: (312) 827-8737**
**E-mail: ema@enginemanufacturers.org**

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**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

| | | |
|---|---|---|
| ENGINE MANUFACTURERS ASSOCIATION,<br><br>Plaintiff,<br><br>v.<br><br>SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT ("SCAQMD"), et al.,<br><br>Defendants. | ) | Case No. 00-09065 FMC (BQRX)<br><br>The following two items were entered as exhibits in this court. |
| NATURAL RESOURCES DEFENSE COUNCIL, INC., COALITION FOR CLEAN AIR, INC., COMMUNITIES FOR A BETTER ENVIRONMENT, INC., PLANNING AND CONSERVATION LEAGUE, and SIERRA CLUB,<br><br>Intervenors. | ) | |
| WESTERN STATES PETROLEUM ASSOCIATION,<br><br>Intervenor. | ) | |



**SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT**

**FINAL PROGRAM ENVIRONMENTAL ASSESSMENT FOR:**

# PROPOSED FLEET VEHICLE RULES AND RELATED RULE AMENDMENTS

**June 5, 2000**

SCAQMD No. 000307DWS

**Executive Officer**
Barry R. Wallerstein, D. Env.

**Deputy Executive Officer**
Planning, Rule Development, and Area Sources
Jack Broadbent

**Assistant Deputy Executive Officer**
Planning, Rule Development, and Area Sources
Elaine Chang, Dr.Ph.

**Planning and Rules Manager**
CEQA, Socioeconomic Analysis, PM/AQMP Control Strategy
Alene Taber, A.I.C.P.

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| | |
|---|---|
| Authors: | Darren W. Stroud – Air Quality Specialist<br>ENSR – Consultant |
| Contributors: | Paul Wuebben – Clean Fuels Officer<br>Dave Coel – Program Supervisor<br>Connie Day – Program Supervisor<br>Shah Dabirian – Air Quality Specialist |
| Reviewed by: | Steve Smith, Ph.D. – Program Supervisor<br>Henry Hogo – Planning and Rules Manager |

Jeri Voge – Senior Deputy
District Counsel
Barbara Baird – District Counsel

* * *

## CHAPTER 3

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## EXISTING SETTING

**Introduction**

**Air Quality**

**Water Resources**

**Transportation / Circulation**

**Public Services**

**Solid / Hazardous Waste**

**Energy / Mineral Resources**

**Hazards**

## INTRODUCTION

In order to determine the significance of the impacts associated with a proposed project, it is necessary to evaluate the project's impacts against the backdrop of the environment as it exists at the time the NOP/IS is published. The CEQA Guidelines defines "environment" as "the physical conditions that exist within the area which will be affected by a proposed project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historical or aesthetic significance" (CEQA Guidelines §15360; see also Public Resources Code §21060.5). Furthermore, a CEQA document must include a description of the physical environment in the vicinity of the project, as it exists at the time the notice of preparation is published,



from both a local and regional perspective (CEQA Guidelines §15125). Therefore, the "environment" or "existing setting" against which a project's impacts are compared consists of the immediate, contemporaneous physical conditions at and around the project site (Remy, et al; 1996).

The following sections set forth the existing setting for each environmental topic analyzed in this report, i.e., air quality, water resources, transportation/circulation, public services, solid/hazardous waste, energy/mineral resources, and hazards. In Chapter 4, potential adverse impacts from these identified environmental areas are then compared to the existing setting to determined [sic] whether the effects of the implementation of the proposed fleet vehicle rules are significant.

## AIR QUALITY

It is the responsibility of the SCAQMD to ensure that state and federal ambient air quality standards are achieved and maintained. Health-based air quality standards have been established by California and the federal government for the following criteria air pollutants: ozone, carbon monoxide (CO), nitrogen dioxide ($NO_2$), particulate matter less than 10 microns (PM 10), sulfur dioxide ($SO_2$) and lead. These standards were established to protect sensitive receptors with a margin of safety from adverse health impacts due to exposure to air pollution. The California standards are more stringent than the federal standards and in the case of PM 10 and $SO_2$, far more stringent. California has also established standards for sulfate, visibility, hydrogen sulfide, and vinyl chloride. The state and national ambient air quality standards for each

of these pollutants and their effects on health are summarized in Table 3-1.

The SCAQMD monitors levels of various criteria pollutants at 33 monitoring stations. In 1998, the area within the SCAQMD's jurisdiction exceeded the federal standards for ozone, carbon monoxide, or PM 10 on a total of 97 days. In 1998, the annual maximum concentrations of ozone and CO in the district exceeded both federal and state standards in some or all areas. For PM 10, only the state standard was exceeded in some or all areas with in the district. In 1998, no areas of the Basin exceeded standards for $NO_x$, $SO_2$, lead, or sulfate. Currently, the district is in attainment with the ambient air quality standards for lead and $SO_2$ and $NO_2$. The 1998 air quality data from SCAQMD's monitoring stations are presented in Table 3-2.

## Ozone

Unlike primary criteria pollutants that are emitted directly from an emissions source, ozone is a secondary pollutant. It is formed in the atmosphere through a photochemical reaction of VOC, NOx, oxygen, and other hydrocarbon materials with sunlight.

Ozone is a deep lung irritant, causing the passages to become inflamed and swollen. Exposure to ozone produces alterations in respiration, the most characteristic of which is shallow, rapid breathing and a decrease in pulmonary performance. Ozone reduces the respiratory system's ability to fight infection and to remove foreign particles. People who suffer from respiratory diseases such as asthma, emphysema, and chronic bronchitis are more sensitive to ozone's effects. In severe cases, ozone is capable of causing death from pulmonary edema. Early studies



suggested that long-term exposure to ozone results in adverse effects on morphology and function of the lung and acceleration of lung-tumor formation and aging. Ozone exposure also increases the sensitivity of the lung to bronchoconstrictive agents such as histamine, acetylcholine, and allergens.

The national ozone ambient air quality standard is exceeded far more frequently in the SCAQMD's jurisdiction than any other area in the United States[1]. In the past few years, ozone air quality has been the cleanest on record in terms of maximum concentration and number of days exceeding the standards and episode levels. Maximum 1-hour average and 8-hour average ozone concentrations in 1998 (0.24 ppm and 0.21 ppm) were 200 percent and 263 percent of the federal 1-hour and 8-hour standards, respectively. Ozone concentrations exceeded the 1-hour state standard at all but two monitored locations in 1998.

The 1-hour federal ozone standard was exceeded a number of days in different areas of the Basin in 1998. The number of days exceeding the federal standard varies widely between different areas of the Basin. The standard was exceeded most frequently in the Basin's inland valleys in an area extending from the East San Gabriel Valley eastward to the Riverside-San Bernardino area and into the adjacent mountains. The Central San Bernardino Valley recorded the greatest number of exceedances of the national ozone standard (57 days).

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[1] It should be noted that in 1999 Houston, Texas exceeded the federal ozone standards on several occasions and reported the highest ozone concentration in the nation.

* * *

In 1997, the USEPA promulgated a new national ambient air quality standard for ozone. However, a recent court decision has ordered that the USEPA cannot enforce the new standard until USEPA provides adequate justification for the new standard. USEPA is in the process of appealing the decision. Meanwhile, CARB and local air districts continue to collect technical information in order to prepare for an eventual SIP to reduce unhealthful levels of ozone in areas violating the new federal standard. California has previously developed a SIP for the current ozone standard.

### Carbon Monoxide

CO is a colorless, odorless gas formed by the incomplete combustion of fuels. CO competes with oxygen, often replacing it in the blood, thus reducing the blood's ability to transport oxygen to vital organs in the body. The ambient air quality standard for carbon monoxide is intended to protect persons whose medical condition already compromises their circulatory systems' ability to deliver oxygen. These medical conditions include certain heart ailments, chronic lung diseases, and anemia. Persons with these conditions have reduced exercise capacity even when exposed to relatively low levels of CO. Fetuses are at risk because their blood has an even greater affinity to bind with CO. Smokers are also at risk from ambient CO levels because smoking increases the background level of CO in their blood.

CO was monitored at 21 locations in the district in 1998. The national and state 8-hour CO standards were exceeded at two and four locations, respectively. The highest



8-hour average CO concentration of the year (13.5 ppm) was 179 percent of the federal standard. Source/Receptor Area No. 12, South Central Los Angeles County, reported by far the greatest number of the exceedances of the federal and state CO standards (10 and 11 days, respectively) in 1998.

### Nitrogen Dioxide

$NO_2$ is a brownish gas that is formed in the atmosphere through a rapid reaction of the colorless gas nitric oxide (NO) with atmospheric oxygen. NO and $NO_2$ are collectively referred to as $NO_x$. $NO_2$ can cause health effects in sensitive population groups such as children and people with chronic lung diseases. It can cause respiratory irritation and constriction of the airways, making breathing more difficult. Asthmatics are especially sensitive to these effects. People with asthma and chronic bronchitis may also experience headaches, wheezing and chest tightness at high ambient levels of $NO_2$. $NO_2$ is suspected to reduce resistance to infection, especially in young children.

By 1991, exceedances of the federal standard were limited to one location in Los Angeles County. The Basin was the only area in the United States classified as nonattainment for the federal $NO_2$ standard under the 1990 Clean Air Act Amendments. No location in the area of SCAQMD's jurisdiction has exceeded the federal standard since 1992 and the South Coast Air Basin was designated attainment for the national standard in 1998. The state $NO_2$ standard has been met each year since 1994. In 1998, the maximum annual arithmetic mean (0.0433ppm) was 81 percent of the federal standard (the federal standard is annual

arithmetic mean $NO_2$ greater than 0.0534 ppm.). The more stringent state standard was exceeded on one day, with a maximum 1-hour average $NO_2$ concentration (0.26 ppm) which was 104 percent of the state standard (0.25 ppm). In 1998, the South Coast Air Basin was redesignated to attainment of the federal $NO_2$ ambient air quality standard. Despite declining $NO_x$ emissions over the last decade, further $NO_x$ emissions reductions are necessary because $NO_x$ emissions are PM 10 and ozone precursors.

### Particulate Matter (PM 10)

PM 10 is defined as suspended particulate matter 10 microns or less in diameter and includes a complex mixture of man-made and natural substances including sulfates, nitrates, metals, elemental carbon, sea salt, soil, organics and other materials. PM 10 may have adverse health impacts because these microscopic particles are able to penetrate deeply into the respiratory system. In some cases, the particulates themselves may cause actual damage to the alveoli of the lungs or they may contain adsorbed substances that are injurious. Children can experience a decline in lung function and an increase in respiratory symptoms from PM 10 exposure. People with influenza, chronic respiratory disease and cardiovascular disease can be at risk of aggravated illness from exposure to fine particles. Increases in death rates have been statistically linked to corresponding increases in PM 10 levels.

In 1998, PM 10 was monitored at 20 locations in the district. There were no exceedances of the federal 24-hour standard (150 $\mu g/m^3$), while the state 24-hour standard (50 $\mu g/m^3$) was exceeded at all 20 locations. The federal



standard (annual arithmetic mean greater than 50 $\mu g/m^3$) was exceeded in two locations, and the state standard (annual geometric mean greater than 30 $\mu g/m^3$) was exceeded at 13 locations.

In 1997, the USEPA promulgated a new national ambient air quality standard for PM2.5, particulate matter 2.5 microns or less in diameter. The PM2.5 standard complements existing national and state ambient air quality standards that target the full range of inhalable PM 10. However, a recent court decision has ordered that the USEPA cannot enforce the new standard until USEPA provides adequate justification for the new standard. USEPA is in the process of appealing the decision. Meanwhile, CARB and local air districts continue to collect technical information in order to prepare for an eventual SIP to reduce unhealthful levels of PM2.5 in areas violating the new federal standard. California has previously developed a SIP for the current PM 10 standard.

### Sulfur Dioxide

$SO_2$ is a colorless, pungent gas formed primarily by the combustion of sulfur-containing fossil fuels. Health effects include acute respiratory symptoms and difficulty in breathing for children. Though $SO_2$ concentrations have been reduced to levels well below state and federal standards, further reductions in emissions of $SO_2$ are needed to comply with standards for other pollutants (sulfate and PM 10).

### Lead

Lead concentrations once exceeded the state and national ambient air quality standards by a wide margin, but have not exceeded state or federal standards at any regular monitoring station since 1982. Though special monitoring sites immediately downwind of lead sources recorded very localized violations of the state standard in 1994, no violations were recorded at these stations since that time.

### Sulfates

Sulfates are a group of chemical compounds containing the sulfate group, which is a sulfur atom with four oxygen atoms attached. Though not exceeded in 1993, 1996, 1997, and 1998 the state sulfate standard was exceeded at three locations in 1994 and one location in 1995. There are no federal air quality standards for sulfate.

### Visibility

Since deterioration of visibility is one of the most obvious manifestations of air pollution and plays a major role in the public's perception of air quality, the state of California has adopted a standard for visibility or visual range. Until 1989, the standard was based on visibility estimates made by human observers. The standard was changed to require measurement of visual range using instruments that measure light scattering and absorption by suspended particles. It has been determined that the calibration of the instruments used to measure visibility was faulty, and no reliable data are available for 1998.



### Volatile Organic Compounds

It should be noted that there are no state or national ambient air quality standards for VOCs because they are not classified as criteria pollutants. VOCs are regulated, however, because reduction in VOC emissions reduces the rate of photochemical reactions that contribute to the formation of ozone. They are also transformed into organic aerosols in the atmosphere, contributing to higher PM 10 and lower visibility levels.

Although health-based standards have not been established for VOCs, health effects can occur from exposures to high concentrations of VOCs because of interference with oxygen uptake. In general, ambient VOC concentrations in the atmosphere are suspected to cause coughing, sneezing, headaches, weakness, laryngitis, and bronchitis, even at low concentrations. Some hydrocarbon components classified as VOC emissions are thought or known to be hazardous. Benzene, for example, one hydrocarbon component of VOC emissions, is known to be a human carcinogen.

### Non-Criteria Pollutant Emissions

Although the SCAQMD's primary mandate is attaining the State and National Ambient Air Quality Standards for criteria pollutants within the district, SCAQMD also has a general responsibility pursuant to the Health and Safety Code, §41700, to control emissions of air contaminants and prevent endangerment to public health. As a result, over the last few years the SCAQMD has regulated pollutants other than criteria pollutants such as TACs, greenhouse gases, and stratospheric ozone depleting compounds. The SCAQMD has developed a number of rules to control non-criteria pollutants from both new and existing stationary

sources. These rules originated through state directives, CAA requirements, or the SCAQMD rulemaking process. Table 3-3 presents the estimated toxic emissions for selected compounds by source category.

## TABLE 3-3

### 1998 Annual Average Daily Toxic Emissions for the South Coast Air Basin (lbs/day)

| Pollutant | On-Road | Off-Road | Point | AB2588 | Area | Total |
|---|---|---|---|---|---|---|
| Acetaldehyde[a] | 5485.8 | 5770.3 | 33.9 | 57.1 | 189.1 | 11536.2 |
| Acetone[b] | 4945.8 | 4824.7 | 3543.5 | 531.4 | 23447.4 | 37292.8 |
| Benzene | 21945.5 | 6533.4 | 217.7 | 266.8 | 2495.4 | 31458.8 |
| Butadiene [1,3] | 4033.8 | 1566.1 | 6.7 | 2.0 | 151.3 | 5759.9 |
| Carbon tetrachloride | 0.0 | 0.0 | 8.8 | 1.8 | 0.0 | 10.6 |
| Chloroform | 0.0 | 0.0 | 0.0 | 35.5 | 0.0 | 35.5 |
| Dichloroethane [1,1] | 0.0 | 0.0 | 0.0 | 0.1 | 0.0 | 0.1 |
| Dioxane [1,4] | 0.0 | 0.0 | 0.0 | 105.0 | 0.0 | 105.0 |
| Ethylene dibromide | 0.0 | 0.0 | 0.0 | 0.2 | 0.0 | 0.2 |
| Ethylene dichloride | 0.0 | 0.0 | 4.9 | 17.6 | 0.0 | 22.5 |
| Ehtylene oxide | 0.0 | 0.0 | 58.1 | 12.3 | 454.1 | 524.4 |
| Formaldehyde* | 16664.9 | 16499.3 | 521.6 | 674.7 | 1107.5 | 35468.0 |
| Methyl ethyl ketone* | 905.1 | 906.9 | 3240.2 | 385.9 | 14535.4 | 19973.5 |
| Methylene chloride | 0.0 | 0.0 | 1378.6 | 1673.6 | 9421.7 | 12473.9 |
| MTBE | 58428.9 | 2679.2 | 40.5 | 434.4 | 5473.7 | 67056.7 |
| p-Dichlorobenzene | 0.0 | 0.0 | 0.0 | 4.5 | 3735.6 | 3740.1 |
| Perchloroethylene | 0.0 | 0.0 | 4622.0 | 2249.1 | 22813.1 | 29684.2 |
| Propylene oxide | 0.0 | 0.0 | 0.0 | 22.3 | 0.0 | 22.3 |
| Styrene | 1114.8 | 287.1 | 447.0 | 3836.7 | 21.4 | 5707.0 |
| Toluene | 63187.6 | 11085.9 | 5689.6 | 3682.4 | 52246.7 | 135892.2 |
| Trichloroethylene | 0.0 | 0.0 | 1.1 | 58.0 | 2550.3 | 2609.3 |
| Vinyl | 0.0 | 0.0 | 0.0 | 4.3 | 0.0 | 4.3 |
| Arsenic | 0.1 | 0.3 | 2.7 | 0.7 | 21.4 | 25.2 |
| Cadmium | 1.6 | 1.5 | 0.5 | 0.7 | 27.5 | 31.8 |
| Chromium | 2.4 | 2.3 | 3.9 | 2.2 | 302.2 | 313.0 |
| Diesel particulate | 23906.3 | 22386.3 | 0.0 | 5.4 | 815.3 | 47113.4 |
| Elemental carbon[c] | 27572.1 | 6690.3 | 702.8 | 0.0 | 16770.5 | 51735.7 |
| Hexavalent chromium | 0.4 | 0.4 | 0.3 | 1.0 | 0.1 | 2.2 |
| Lead | 0.7 | 0.9 | 1.9 | 24.5 | 1016.3 | 1044.3 |
| Nickel | 2.5 | 2.2 | 2.9 | 21.6 | 85.6 | 114.9 |
| Organic carbon | 16426.2 | 15381.8 | 0.0 | 0.0 | 108612.1 | 140420.2 |
| Selenium | 0.1 | 0.1 | 3.0 | 5.7 | 2.6 | 11.6 |
| Silicon[b] | 68.6 | 67.6 | 167.2 | 0.0 | 248614.0 | 248917.4 |

Source: Final Report MATES II Study, SCAQMD (March, 2000).

* Primarily emitted emissions. These materials are also formed in the atmosphere as a result of photochemical reactions.

[b] Acetone and silicon are not toxic compounds. Their emissions are included here because they were measured in the sampling program and were subsequently modeled for the purpose of model evaluation.

[c] Includes elemental carbon from all sources (including diesel particulate).

## Health Effects from Toxic Air Contaminants

### *Cancer Risk*

When "carcinogenic risk" is discussed, it typically refers to the increased probability that an individual exposed to an average air concentration of a chemical will develop cancer when exposed over 70 years. Cancer risks are often expressed on a per-million basis for comparative purposes. As an example, a cancer risk of 100 in a million at a location means that the individuals staying at that location for 70 years have a 100 in a million chance of contracting cancer.

Health statistics show that one in four people will contract cancer over their lifetime, or 250,000 in a million, from all causes, including diet, genetic factors and lifestyle choices.

One of the primary health risks of concern due to exposure to TACs is the risk of contracting cancer. The carcinogenic potential of TACs is a particular public health concern because it is currently believed by many scientists that there is no "safe" level of exposure to carcinogens. Any exposure to a carcinogen poses some risk of causing cancer. It is currently estimated that about one in four deaths in the United States is attributable to cancer. About two percent of cancer deaths in the United States may be attributable to environmental pollution (Doll and Peto, 1981).

### *Noncancer Health Risks*

It is only relatively recently that regulatory agencies have begun to address TACs that are associated with health effects other than cancer (e.g., birth defects, reproductive problems, genetic mutations, etc.). A preliminary study by

USEPA found that exposures to TACs have a significant potential to cause adverse noncancer health impacts (USEPA, 1990). The study found that of 150 chemicals for which health data and quantitative exposure data were available, about half exceeded relative exposure levels (RELs) at numerous sites throughout the country. The study also found that exposure to chemical mixtures may result in adverse noncancer health risks that might not be predicted if only the impacts of individual pollutants are considered.

Unlike carcinogens, for most noncarcinogens it is believed that there is a threshold level of exposure to the compound below which it will not pose a health risk. The CaLEPA and OEHHA develop RELs for TACs that are health-conservative estimates of the levels of exposure at or below which health effects are not expected. The noncancer health risk due to exposure to a TAC is assessed by comparing the estimated level of exposure to the REL. The comparison is expressed as the ratio of the estimated exposure level to the REL, called the hazard index (HI).

A "cancer burden" typically refers to the number of excess cancer cases expected in the exposed population. If 10,000 people live at that location, then the cancer burden for this population will be one (the population multiplied by the cancer risk). This means that one of the 10,000 people staying at the location for 70 years is estimated to contract cancer.

### Multiple Air Toxics Exposure Study II (MATES II) Study

The MATES II study, which is the most comprehensive study of urban toxic air pollution ever undertaken, shows



that motor vehicles and other mobile sources of air pollution are the predominant source of cancer-causing air pollutants in the Southland. The SCAQMD's Governing Board directed staff to undertake the MATES II study as part of the agency's environmental justice initiatives (e.g., EJ Initiative #7) adopted in late 1997. A panel of scientists from universities, an environmental group, businesses and other government agencies helped design and guide the study. The study was aimed at determining the cancer risk from toxic air pollution throughout the area by monitoring toxics continually for one year at 10 fixed-monitoring sites. Another goal was to determine if there were any sites where concentrations of industry were causing a disproportionate cancer burden on surrounding communities. To do so, the SCAQMD monitored toxic pollutants at 14 sites for one month each with three mobile monitors. Although no such sites were identified, models show that elevated levels can occur very close to facilities emitting toxic pollutants. Monitoring platforms were placed in or near residential areas adjacent to clusters of facilities.

In the MATES II study, SCAQMD monitored more than 30 toxic air pollutants at 24 sites (10 fixed and 14 temporary) over a one-year period in the spring of 1999. The SCAQMD collected more than 4,500 air samples and together with the California Air Resources Board performed more than 45,000 separate laboratory analyses of these samples. A similar study known as MATES I was conducted in 1986 and 1987. In each study, SCAQMD calculated cancer risk assuming 70 years of continuous exposure to monitored levels of pollutants.

The MATES II study found that the average carcinogenic risk in the Basin is about 1,400 in one million (1400 x 10-6). Mobile sources (e.g., cars, trucks, trains, ships, aircraft,

etc.) represent the greatest contributors. As shown in Figure 3-1, about 70 percent of all risk is attributed to diesel particulate emissions; about 20 percent to other toxics associated with mobile sources (including benzene, butadiene, and formaldehyde); about 10 percent of all risk is attributed to stationary sources (which include industries and other certain businesses such as dry cleaners and chrome plating operations.)

* * *



**FINAL REPORT**

# Multiple Air Toxics Exposure Study in the South Coast Air Basin

## MATES-II

**MARCH 2000**

[LOGO] South Coast Air Quality Management District

21865 E. Copley Drive
Diamond Bar, CA 91765-2079

## Executive Summary

The Multiple Air Toxics Exposure Study (MATES-II) is a landmark urban toxics monitoring and evaluation study conducted for the South Coast Air Basin (Basin). The study was initiated as part of the Environmental Justice Initiatives adopted by the South Coast Air Quality Management District (District) Governing Board in October 1997. The study represents one of the most comprehensive air toxics programs ever conducted in an urban environment, and certainly much more comprehensive than a similar study (MATES-I) conducted by the District over a decade ago.

The MATES-II project consists of several elements. It consists of a comprehensive monitoring program, an updated emissions inventory of toxic air contaminants, and a modeling effort to fully characterize Basin risk.

There were two separate monitoring components to MATES-II: (1) a network of 10 fixed sites which monitored for toxic air contaminants once every six days for an entire

year (from April 1998 through March 1999); and (2) a microscale study which utilized three mobile platforms to sample at 14 additional communities. The microscale study specifically targeted residential areas which could be influenced by nearby sources of toxic emissions. In order to cover all these locations in a one-year period, the sampling platforms were situated in a community for a one-month period. For the entire program, both fixed and microscale sites, over 4,500 samples were collected and analyzed. Due to the large number of samples, laboratories at both the District and the California Air Resources Board (ARB) shared responsibilities for the chemical analyses.

In addition to the monitoring portion, MATES-II also included an update of the latest toxics emissions inventories for the Basin, and computer modeling to determine a more complete picture of toxics risks. Since it is not feasible to conduct sampling at each and every location in the Basin, it is important to utilize the models to provide predictions for locations where monitoring has not been possible. (It should be noted that the costs for this program are over $750,000, not counting the in-kind services provided by the ARB.)

To provide important scientific guidance to the District during the study, the Air Toxics Study Technical Review Group (ATSTRG) was formed. This panel of 13 experts from academia, environmental groups, industry, and public agencies, representing expertise in air toxics, was assembled to review the project from inception, and to offer guidance on ways to improve the study. The program design reflected, to a large extent, the input provided by this panel.

In the monitoring program, over 30 air pollutants were measured. (Table ES-1). These included both gas and particulates. Toxic air contaminants are determined by the



U.S. EPA, and by the California EPA, including the Office of Environmental Health Hazard Assessment and the ARB. For purposes of this study, the California toxic risk factors are used.

**Table ES-1**

**Pollutants Measured in MATES-II**

| CAS No. | Chemical Name | CAS No. | Chemical Name |
|---|---|---|---|
| 71432 | Benzene | 50000 | Formaldehyde |
| 7440439 | 1,3 Butadiene | 75070 | Acetaldehyde |
| 106467 | Dichlorobenzene (ortho- & para) | | Acetone |
| 75014 | Vinyl Chloride | 7440382 | Arsenic |
| 10414 | Ethyl Benzene | | Chromium |
| | Toluene | 7439921 | Lead |
| | Xylene (m-, p-, o-) | 7440020 | Nickel |
| | Styrene | | Cobalt |
| 56235 | Carbon Tetrachloride | | Copper |
| 67663 | Chloroform | | Manganese |
| 75343 | Dichloroethane [1,1] | 7723140 | Phosphorous |
| | Dichloroethane [1,1] | | Selenium |
| 75092 | Methylene Chloride | | Silica |
| 127184 | Perchloroethylene | | Silver |
| 79016 | Trichloroethylene | | Zinc |
| 74783 | Chloromethane | | PAHs |
| | | | Elemental Carbon |
| | | | Organic Carbon |

Toxic measurements in the Basin are not new. Although MATES-II represents the most comprehensive study of its kind, the ARB has collected samples at five sites in the Basin since 1990. As a background to the current study, an evaluation of the trends of key toxic pollutants was conducted. Data from all sites have shown a pronounced decrease in toxic levels in the Basin from 1990 through 1997. In fact, the risk associated with cancer rates (often referred to as "carcinogenic risk") associated with air toxics has decreased by about 50 percent during this period.

When "carcinogenic risk" is discussed, it typically refers to the increased probability that an individual exposed to an average air concentration of a chemical will develop cancer when exposed over 70 years. Cancer risks are often expressed on a per-million basis for comparative purposes. As an example, a cancer risk of 100 in a million at a location means that the individuals staying at that location for 70 years have a 100 in a million chance of contracting cancer.

A "cancer burden" typically refers to the number of excess cancer cases expected in the exposed population. If 10,000 people live at that location, then the cancer burden for this population will be one (the population multiplied by the cancer risk). This means that one of the 10,000 people staying at the location for 70 years is estimated to contract cancer.

To make carcinogenic risk determinations, at least one full year of data is strongly recommended to represent exposure potential. This is why the fixed site network (or "regional study") was conducted over a one-year period. The microscale study, on the other hand, is intended more



to determine whether localized sources of emissions cause a significant increase in concentration of certain toxic air contaminants. Data collected at these sites cannot readily be expressed in terms of risk because only one month of data is available at 12 of the 14 microscale sites. (At two sites, sampling was conducted for one month during each calendar quarter.) Localized conditions can be assessed, however, by comparing the toxic levels at each microscale site to its nearest station in the fixed-site network. Where differences occur the microscale influences of nearby sources can be estimated. To further complement this assessment, microscale-level modeling has been included in this study, as well as an enhanced toxics inventory in the immediate vicinity of each microscale site. These efforts, combined, provide a mechanism for both regional-scale and local-scale air toxic characterizations across the Basin.

Consistent with the fact that most of the region's population and toxic-emitting sources are within Los Angeles County, most of the monitoring sites were placed in Los Angeles County. Of the 10 fixed sites, seven were in Los Angeles County, and one each in the other three counties of the Basin. Because fixed sites are situated based on EPA guidelines for "neighborhood scale" monitoring, each of the ten locations may be representative of adjacent communities as well. Microscale sites, on the other hand, were specifically located to characterize localized conditions. For the 14 microscale sites, eight were in Los Angeles County and two in each of the other three counties. (See Figure ES-1.) Unlike reactive pollutants, such as ozone and fine particulates which increase in concentration as the wind carries its precursor emissions inland,

many toxic pollutants are non-reactive. This means that highest levels are expected to be close to the sources.

The key results of the MATES-II study are as follows;

**Fixed-Site (Regional) Program**

**A. Monitoring**

1) The carcinogenic risk in the Basin is about 1,400 per million people*. Mobile sources (e.g., cars, trucks, trains, ships, aircraft, etc.) represent the greatest contributor. About 70% of all risk is attributed to diesel particulate emissions; about 20% to other toxics associated with mobile sources (including benzene, butadiene, and formaldehyde); about 10% of all risk is attributed to stationary sources (which include industries and other certain businesses such as dry cleaners and chrome plating operations.) (See Figure ES-2.)

2) The carcinogenic risk of 1,400 per million is based on a range from about 1,120 in a million to about 1,740 in a million among the ten sites. (See Figure ES-3, top.)

* Based on the average of the pollutant concentrations measured at the fixed monitoring sites.

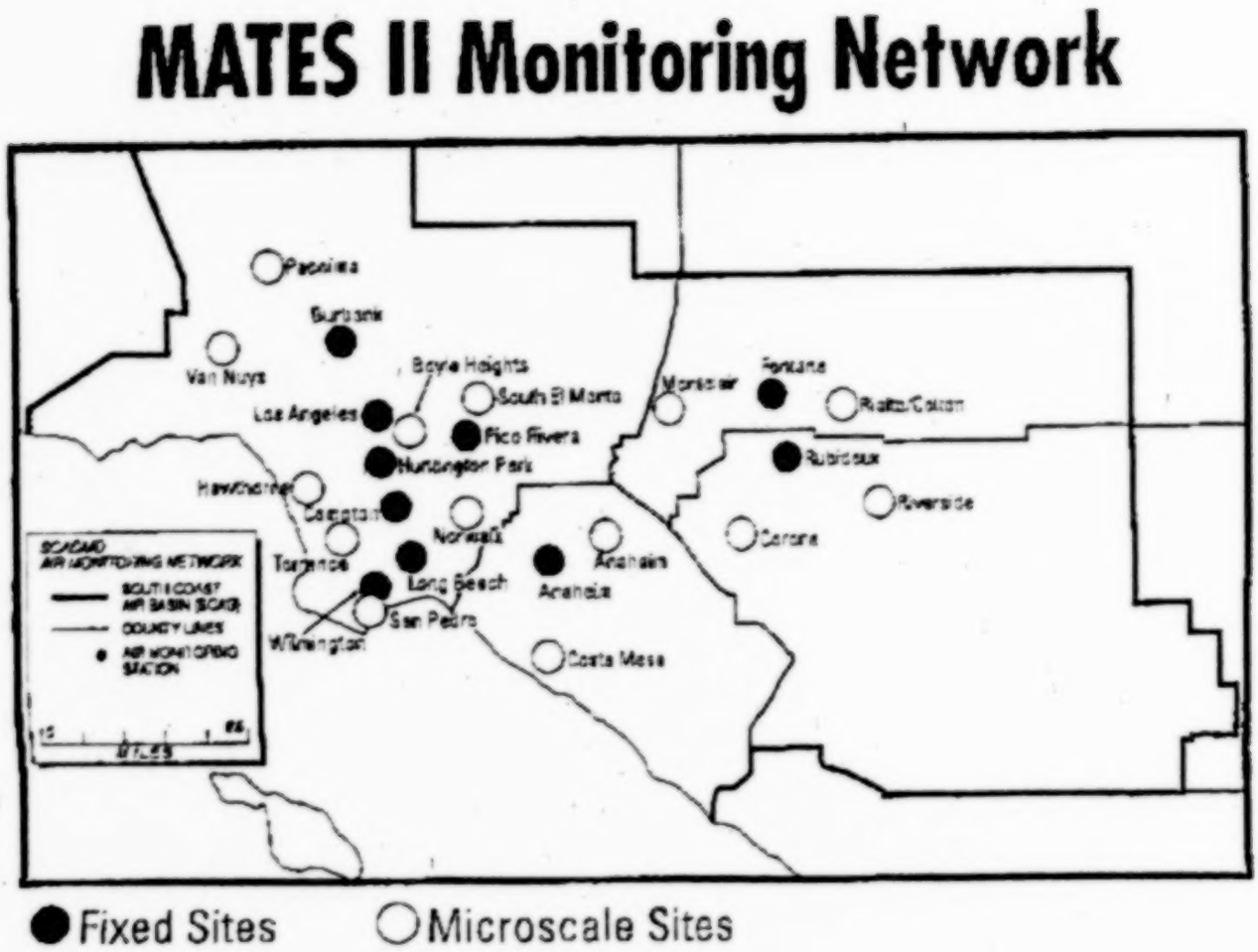



**Figure ES-1. Map of MATES - II Monitoring Locations**

3) The sites with the greatest risk levels were in the south-central and east-central portions of Los Angeles County. At these locations, the dominance of mobile sources is even greater than at other sites. The sites with the lower risk levels were mostly in the other three counties. (See Figure ES-3, top and middle.)

4) The differences in carcinogenic risk from one site to another are much more driven by the influence from mobile sources than from stationary sources. (See Figure ES-3, top and middle.)

5) The carcinogenic risk from one site to another, as ascribed to stationary sources, is rather uniform across the Basin. In this respect, there is not much difference among the four county sites. (See Figure ES-3, bottom.)

6) There are strong seasonal variations to the levels of toxic air contaminants, primarily with those pollutants associated with mobile sources. Elemental carbon (a surrogate for diesel particulates), benzene, and butadiene – all have seasonal peaks in the late fall and winter months. Lowest levels are observed during the spring and summer months. (See Figure ES-4, top.)

7) The seasonal variations with respect to toxic air contaminants from stationary sources are generally small. Levels are quite consistent across all months of the year. (See Figure ES-4, bottom.)

8) Levels of risk are, for the most part, consistent with the long-term downward trends evident in the ARB data since 1990. Noticeable improvements have occurred for three major elements of toxic risk: hexavalent chromium, benzene, and butadiene. (Note: trends for diesel particulates are not available from the ARB data, however,

elemental carbon trends recently reported by Christoforou, et al., (2000) indicate a decrease of about 32% from the early 1980's to the early 1990's.)

**B. Modeling**

1) Model results show similar levels of carcinogenic risk across the Basin as does the monitoring data. Models also show the strong domination of mobile sources contributing to risk.

2) The model results, which are more complete in describing risk levels across the Basin than is possible with the monitored data, show that the higher risk levels occur in the south-central Los Angeles area, in the harbor area, and near freeways. (See Figure ES-5.)

3) Results suggest that the basinwide cancer risk level may be 16 percent lower than the corresponding risk levels estimated from the monitoring sites.

4) Results show that the higher pollutant concentrations generally occur near their emission sources.

5) Models generally underestimate measured values. It is estimated that model performance would improve with the latest versions of the mobile source emission models provided by the California Air Resources Board.

**Microscale Program**

1) With few exceptions, the monitoring at each of the 14 microscale sites did not register significantly higher levels of any toxic air contaminants.



However, it cannot be concluded that "hot spots" do not exist at other locations.

2) Significantly higher levels of styrene (not currently assigned a carcinogenic risk factor, but a pollutant which was measured as part of the laboratory analysis) was observed at the Anaheim microscale site. This finding is corroborated by an examination of local emissions inventories which found three facilities that emit styrene to be close to the monitoring site. This illustrates that local "hot spots" do occur.

3) Significantly higher levels of formaldehyde were measured at the San Pedro microscale site. The nature of the measurements, showing decreasing levels of formaldehyde over time, and insensitivity of such levels to changes in wind directions, suggest an instrument contamination problem as the cause for this observation.

4) Even at microscale sites, the risk impacts are dominated more by mobile sources than by stationary sources. For only two sites (Torrance and Costa Mesa) are stationary sources more dominant than mobile sources. At these sites, they do not necessarily have higher stationary source emissions, rather there is a noticeable decrease in the levels of toxic air contaminants from mobile sources.

5) Levels of toxic air contaminants associated with stationary source emissions are reasonably uniform among the microscale sites, consistent with the findings from the fixed site locations.

6) Facility-based modeling conducted as part of the permitting process shows that highest levels of toxic air contaminants can occur very close to the fence-line of facilities. Due to logistical constraints

in placing mobile monitoring platforms, locations other than where the microscale platforms were located could therefore have higher levels than at the microscale monitoring sites.

**Caveats and Risk Uncertainty**

1) There is currently no technique to directly measure diesel particulates, the major contributor to basinwide carcinogenic risk. Based on research results as reported by ARB, diesel particulates can be estimated by measuring elemental carbon, a black, sooty particulate. In essence, elemental carbon becomes a surrogate for diesel particulates. Although this estimating technique is likely to have uncertainties, the emissions inventory and modeling, which account for directly emitted diesel particulates, confirm that diesel particulates are the major contributor to carcinogenic risk.

2) The determination of risk values for each compound carries a level of uncertainty, which, for some pollutants, is large. Typically, the risk values are derived from animal or epidemiological studies of exposed workers or other populations. Uncertainty occurs from the application of individual results to the general population. When risk factors for specific compounds are determined, levels are usually established conservatively. There is considerable debate on appropriate risk values, and often the levels established by the USEPA and CalEPA differ. For the purpose of this study, California values are used.

3) There is further debate as to the appropriate levels of risk ascribed to diesel particulates. CalEPA, in recommending a cancer risk level of 300 in a million per microgram per cubic meter ($ug/m^3$) of diesel particulates, considered evidence



which suggested diesel risks as low as 150 in a million to as high as 2400 in a million per $ug/m^3$. The USEPA has not yet declared diesel particulates as a toxic air contaminant. Thus, the selection of a risk factor for diesel particulates can have a substantial effect in assessing overall risks; however, even using the lowest bound of the CalEPA-recommended risk factor (150 in a million) does not change diesel's domination in the overall risks. For purposes of this study, and to be consistent with the approaches used for other toxic pollutants, the CalEPA recommended value of 300 in a million per $ug/m^3$ is used.

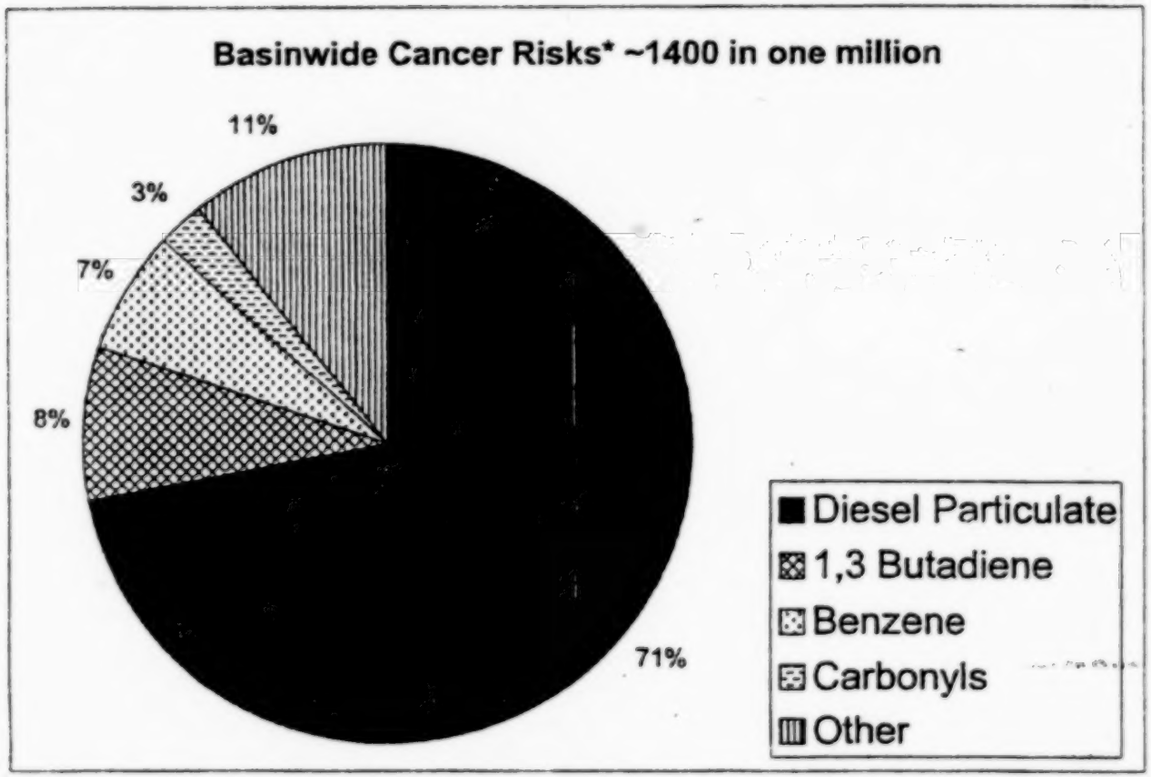
4) There is an estimated uncertainty level of + 25 percent associated with laboratory measurements of many toxic compounds. Part of this uncertainty is attributed to the fact that many of the toxic compounds measured are at extremely low concentration levels, at parts per billion (ppb) levels, and often near the detection limits of the instrumentation. A number of compounds cannot be detected at all. When non-detections occur, it is assumed that the actual levels are not zero, but are half of the instrument detection limit. In other words, if the detection limit is 1 ppb, and a compound is not detected at that level, it is assumed that the actual concentration is one-half of 1 ppb. This convention has been in use by the Air Resources Board since the reporting of monitored toxics in the state commenced in 1990. This convention allows the vast majority of the data users to statistically manage the data. Other methods of handling non-detects are often difficult to implement or offer no practical advantage. The method is a conservative one that protects the public when analytical shortcomings cannot address real emissions that are known to exist. Although this

convention is not in regulation form, it is considered at this time to be the best available tool for addressing concentrations of pollutants where current laboratory technologies cannot yet detect such low levels, and at the same time treating public safety concerns. As a sensitivity test, it was assumed that non-detect values were zero for those pollutants which had a predominance of non-detections. Under such an assumption, the overall risk values would have been lowered by 4.6%.

* * *

**Figure ES-2**

**Major Pollutants Contributing to Cancer Risk**
**In the South Coast Air Basin**




*Based on the average of the pollutant concentrations measured at the fixed monitoring sites.

Supreme Court, U.S.
FILED

AUG 29 2003

OFFICE OF THE CLERK

No. 02-1343

# In the Supreme Court of the United States

ENGINE MANUFACTURERS ASSOCIATION AND
WESTERN STATES PETROLEUM ASSOCIATION,

*Petitioners,*

v.

SOUTH COAST AIR QUALITY MANAGEMENT
DISTRICT, *ET AL.*,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR THE PETITIONERS

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## QUESTION PRESENTED

Whether local government regulations prohibiting the purchase of new motor vehicles with specified emission characteristics — which are otherwise approved for sale by state and federal regulators — are preempted by Section 209(a) of the Clean Air Act, which expressly preempts any state or local "standard relating to the control of emissions from new motor vehicles." 42 U.S.C. § 7543(a).

## LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioner Engine Manufacturers Association ("EMA"), a not-for-profit trade association, was plaintiff and appellant below. It has no corporate parents, subsidiaries or affiliates, and no publicly traded company has a 10% or greater ownership interest in EMA.

Petitioner Western States Petroleum Association ("WSPA") intervened as a plaintiff and was an appellant in the court of appeals. It is a trade association organized as a non-profit corporation. WSPA has no corporate parents, subsidiaries or affiliates, and no publicly traded company has a 10% or greater ownership interest in WSPA.

Respondents South Coast Air Quality Management District, its individual Board Members (William A. Burke, Norma J. Glover, Michael D. Antonovich, Hal Bernson, Jane W. Carney, Cynthia P. Coad, Beatrice J.S. Lapisto-Kirtley, Ronald O. Loveridge, Jon D. Mikels, Leonard Paulitz, Cynthia Vedugo-Peralta, and S. Roy Wilson), and its Executive Officer (Barry S. Wallerstein) were defendants and appellees below.

The Natural Resources Defense Council, Coalition for Clean Air, Communities for a Better Environment, Inc., Planning & Conservation League, and Sierra Club intervened as defendants and were appellees in the court of appeals.



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## BRIEF FOR THE PETITIONERS

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is reported at 309 F.3d 550. The opinion of the district court granting summary judgment for respondents (Pet. App. 3a-27a) is reported at 158 F. Supp. 2d 1107.

### JURISDICTION

The judgment of the court of appeals was entered on October 24, 2002, and a petition for rehearing was denied on December 11, 2002. Pet. App. 2a, 28a-29a. The petition for a writ of certiorari was filed on March 11, 2003, and was granted on June 9, 2003. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, U.S. Const. art. VI, cl. 2, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 209(a) of the Clean Air Act, 42 U.S.C. § 7543(a), provides:

> No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

The Fleet Rules promulgated by respondent South Coast Air Quality Management District appear at pages 16-74 of the Joint Appendix.

## STATEMENT

This case concerns the scope of Section 209(a) of the Clean Air Act, 42 U.S.C. § 7543(a), which expressly preempts state and local "standard[s] relating to the control of emissions from new motor vehicles." This Court has observed that by this language "Congress has largely preempted the field with regard to 'emissions from new motor vehicles.'" *Washington* v. *General Motors Corp.*, 406 U.S. 109, 114 (1972).

Respondent South Coast Air Quality Management District ("SCAQMD" or "the District"), a local governmental body in California, has adopted "Fleet Rules" that prohibit an operator of a fleet of 15 or more vehicles from purchasing certain types of new motor vehicles because of those vehicles' emission characteristics. The Fleet Rules are preempted "standard[s] relating to the control of emissions" under Section 209(a). They were adopted with the undisputed purpose and effect of reducing motor vehicle emissions by prohibiting the purchase of certain new motor vehicles otherwise approved for sale in California by the federal and state governments.

Unlike stationary sources of air pollution such as factories and power plants — over which the States retain substantial regulatory authority, subject to general oversight by the United States Environmental Protection Agency ("EPA") (see 42 U.S.C. §§ 7401-7515; *Washington*, 406 U.S. at 114) — mobile sources of air pollution (particularly new motor vehicles) are regulated exclusively by federal law, subject to narrow exceptions allowing the State of California to adopt and enforce standards relating to new motor vehicle emissions, but only with the approval of EPA, 42 U.S.C. § 7543(b).



States other than California, under certain limited conditions set forth in Section 177 of the Clean Air Act, may also adopt California's motor vehicle emission standards as to which EPA has waived preemption, 42 U.S.C. § 7507. Under no circumstances, however, may any State (including California) impose any standard relating to the control of new motor vehicle emissions without the express approval of EPA. Nor may any local governmental body impose standards relating to the control of emission from new motor vehicles.

The Fleet Rules at issue in this case are not covered by any of the limited exceptions in the Clean Air Act for state motor vehicle emission standards. First, the District is not a State. Second, the Fleet Rules vary from the EPA-approved standards adopted by the State of California by prohibiting the purchase of certain vehicles that already have been approved for sale in the State. Third, the Fleet Rules have never been approved by EPA.

If the District can adopt local standards banning the purchase of certain new motor vehicles based on their emission characteristics, then other local governments can do the same. Such action would directly contravene the express, and plainly stated, provisions of the Clean Air Act that prohibit the adoption of such standards except in strict accordance with EPA's preemption waiver procedures. Allowing the District's Fleet Rules to stand would undermine Congress's determination that — to prevent chaos in the motor vehicle industry — only the federal government and the State of California, with EPA's approval, should be permitted to establish standards relating to emissions from new motor vehicles.

### A. The Clean Air Act.

The Clean Air Act (42 U.S.C. §§ 7401-7671q) divides the sources of air pollution into two categories — stationary and mobile — and provides fundamentally different regulatory regimes for each. Title I of the Act, which regulates stationary

sources of air pollution, directs EPA to establish "national ambient air quality standards" and requires each State to submit for EPA review and approval a "state implementation plan" for meeting those standards. 42 U.S.C. §7408. The plan must identify and describe the state emission control regulations adopted for sources of air pollution in the State.

Title II of the Act (42 U.S.C. §§ 7521-7590), which is at issue here, regulates mobile sources of air pollution, primarily motor vehicles. "In contrast to federally encouraged state control over stationary sources, regulation of motor vehicle emissions ha[s] been a principally federal project." *Engine Mfrs. Ass'n* v. *EPA*, 88 F.3d 1075, 1079 (D.C. Cir. 1996).

1. The first time Congress mandated the exercise of federal regulatory authority to reduce air pollution was in 1965, when Congress directed the federal government to regulate emissions from new motor vehicles and new motor vehicle engines. Pub. L. No. 89-272, § 101(8), 79 Stat. 992 (1965) (42 U.S.C. § 1857f-1 (Supp. IV, 1966-1968)). Despite the enactment of this statute and the adoption of a regulation establishing emission levels in 1966 (see 31 Fed. Reg. 5,170 (1966)), "[a] number of states * * * continued to develop separate emission programs. Congress thereupon promptly amended the Clean Air Act in 1967 to impose federal preemption." *Motor Vehicle Mfrs. Ass'n* v. *New York State Dep't of Envtl. Conservation*, 17 F.3d 521, 525 (2d Cir. 1994) ("*MVMA*"); see also H.R. Rep. No. 728, 90th Cong., 1st Sess. 21 (1967) (preemption is "necessary in order to prevent a chaotic situation from developing in interstate commerce in new motor vehicles"); S. Rep. No. 403, 90th Cong., 1st Sess. 33 (1967) (under federal preemption, "industry * * * will be able to minimize economic disruption and therefore provide emission control systems at lower costs to the people of the Nation").

The express preemption provision adopted by Congress, now Section 209(a) of the Act (codified at 42 U.S.C.



§ 7543(a)), contains two separate restrictions on state authority. First, "[n]o State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part." Second, "[n]o State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment."

The provision also contains a savings clause, now codified in Section 209(d), in which Congress delineated the outer boundaries of its preemption of state and local law. It provides that "[n]othing in this title shall preclude or deny to any State or political subdivision the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles." Pub. L. No. 90-148, § 2, 81 Stat. 501 (1967) (codified as amended at 42 U.S.C. § 7543(d)). Thus, the States retained authority to regulate the use, operation, or movement of motor vehicles only through means *other than* standards or approvals relating to the control of emissions from new motor vehicles or new motor vehicle engines.

Congress permitted only one exception to Section 209(a)'s expansive preemption. During the debate on the 1967 statute, "representatives of the State of California were clearly opposed to displacing that State's right to set more stringent standards to meet peculiar local conditions." S. Rep. No. 403, at 33. Congress concluded that "California's unique problems and pioneering efforts justified a waiver of the preemption section to the State." *Ibid.*

Accordingly, the statute requires the federal government to waive application of the preemption section to a standard adopted by the State of California unless EPA finds that the State "[did] not require standards more stringent than applica-

ble Federal standards to meet compelling and extraordinary conditions" or that the California standard was inconsistent with the rule-making criteria established by federal law. Pub. L. No. 90-148, § 2, 81 Stat. 501 (now codified, as subsequently amended, at Section 209(b), 42 U.S.C. § 7543(b)). The statute, by its terms, made the waiver process available to any State that had adopted motor vehicle emission control standards prior to March 30, 1966, but California was the only State that satisfied that test. *MVMA*, 17 F.3d at 525.

Given the broad language in Section 209(a), and the limited exception for California in Section 209(b), it is not surprising that when this Court surveyed federal law with respect to air pollution in 1972 it observed that "Congress has largely preempted the field with regard to 'emissions from new motor vehicles.'" *Washington*, 406 U.S. at 114 (citing Section 209(a)); see also *Motor & Equip. Mfrs. Ass'n* v. *EPA*, 627 F.2d 1095, 1109 (D.C. Cir. 1979) ("*MEMA*") ("Congress in 1967 expressed its intent to occupy the regulatory role over emissions control to the exclusion of all the states, all, that is, except California"); *City of Chicago* v. *General Motors Corp.*, 467 F.2d 1262, 1264 (7th Cir. 1972) (footnote omitted) (Section 209(a) preempts "the entire field of standards for emissions from new motor vehicles").

Congress's approach with respect to emissions from new motor vehicles stands in sharp contrast to the path that it took with respect to stationary sources of air pollution. Although under Title I of the Act, the federal government sets the national ambient air quality standards that establish permissible concentrations of various types of air pollutants, "it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met." *Train* v. *NRDC*, 421 U.S. 60, 79 (1975) (footnote omitted); see also *id.* at 79 n.16 (characterizing the federal government's authority over emissions from new motor



vehicles as an "[e]xception" to this approach); *Washington*, 406 U.S. at 115 ("[s]o far as factories, incinerators, and other stationary devices are implicated, the States have broad control * * *").

To confirm the leading role for the States in controlling *non-mobile* sources of air pollution, Congress enacted a general savings clause in Title I, 42 U.S.C. § 7416, preserving "the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution." Nevertheless, to confirm federal authority over *mobile* sources of air pollution, Congress expressly excepted the "standard[s] relating to the control of emissions from new motor vehicles" set forth in Section 209(a) from that savings clause.

Congress has amended the Clean Air Act several times since 1967, but it has not altered the basic scheme that establishes the federal government as preeminent with respect to the regulation of pollution from new motor vehicles and motor vehicle engines. To this day, only two sets of standards relating to new motor vehicle emissions are permissible — those adopted by the federal government and those adopted by the State of California for which EPA has granted a waiver.

2. Congress in 1977 amended the motor vehicle provisions of the Clean Air Act in two relevant respects. First, it allowed certain States other than California — under conditions "carefully circumscribed to avoid placing an undue burden on the automobile manufacturing industry" (*MVMA*, 17 F.3d at 527) — to adopt, in whole, California standards as to which the federal government has waived preemption. Section 177 of the Act, 42 U.S.C. § 7507, excludes from the preemptive scope of Section 209(a) "standards relating to control of emissions" and "such other actions as are referred to in [Section 209(a)] if * * * such standards are identical to the California standards for

which a waiver has been granted for such model year" and if both California and the other State adopt the standards at least two years before the commencement of the model year. Thus, "[r]ather than being faced with 51 different standards, as they had feared, or with only one, as they had sought, manufacturers must cope with two regulatory standards * * *." *Engine Mfrs. Ass'n*, 88 F.3d at 1080.

The 1977 amendments also revised the statutory test for granting a request by California for a waiver of preemption. The principal change was to require the federal government "to consider California's standards as a package, so that California could seek a waiver from preemption if its standards 'in the aggregate' protected public health at least as well as federal standards." *MVMA*, 17 F.3d at 525. In addition, Congress directed the federal government in considering a waiver request under Section 209(b) of the Act to accord deference to the State's judgment regarding the effect of its standards on the public health and welfare. 42 U.S.C. § 7543(b) (Pub. L. No. 95-95, § 207, 91 Stat. 755 (1977)).

3. Congress again revisited the Clean Air Act in 1990. It added a second paragraph to Section 177 — the provision authorizing other States to adopt California standards that received a Section 209(b) preemption waiver — to emphasize the strict limitations on the authority of such a State:

> Nothing in this section or [in the title of the Act concerning mobile source pollution] shall be construed as authorizing any * * * State [that adopts California standards] to prohibit or limit, directly or indirectly, the manufacture or sale of a new motor vehicle or motor vehicle engine that is certified in California as meeting California standards, or to take any action of any kind to create, or have the effect of creating, a motor vehicle or motor vehicle engine different than a motor vehicle or engine certified in California under



> California standards (a "third vehicle") or otherwise create such a "third vehicle."

Pub. L. No. 101-549, § 232, 104 Stat. 2529 (1990). This language was added to "codif[y], in effect, Congress's understanding of the authority originally [given] to states by Section 177 as expressed in the legislative history of Section 177 when it was adopted in 1977." Clean Air Conference Report (Oct. 27, 1990), A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1990 1001, 1021-1022 (1993); see also Exhibit 1 (Oct. 27, 1990), *id.* at 790 (entered by Sen. Mitchell) (describing the amendment to section 177 as "a mere clarification of current law").

Congress in 1990 also required some States that had failed to reduce air pollution levels in accordance with national ambient air quality standards to force operators of fleets of cars and trucks to purchase specified percentages of vehicles that "would be substantially cleaner than conventional vehicles." H.R. Conf. Rep. 101-952, 101st Cong., 2d Sess. 337 (1990). Each State must submit to EPA for approval an implementation plan setting forth the emission limitations and other rules adopted by the State — relating principally to the regulation of stationary sources such as power plants and factories — that are designed to produce compliance with the federal air quality standards and other requirements of the Act. See generally *General Motors Corp.* v. *United States*, 496 U.S. 530, 533 (1990); *Train*, 421 U.S. at 79-80.

The 1990 amendments provide that a State that has failed to attain specified air quality levels must submit for EPA approval a revised implementation plan that requires operators of centrally fueled fleets of ten or more specified types of vehicles to purchase a designated percentage of "clean-fuel vehicles." Section 246, 42 U.S.C. § 7586 (Pub. L. No. 101-549, § 229(a), 104 Stat. 2520). A "clean-fuel vehicle" is one that meets the clean-fuel vehicle emission standards established

under the Act (Section 241(7), 42 U.S.C. § 7581(7) (Pub. L. No. 101-549, § 229(a), 104 Stat. 2513)).

Significantly, the Clean Air Act's "clean-fuel fleet" provisions state that "[t]he plan revision * * * shall provide that the choice of clean-fuel vehicles and clean alternative fuels shall be made by the covered fleet operators subject to the requirements" of Section 246. Section 246(d), 42 U.S.C. § 7586(d). The provisions also broadly define "clean alternative fuel" as "any fuel (including methanol, ethanol, or other alcohols * * *, reformulated gasoline, diesel, natural gas, liquefied petroleum gas, and hydrogen) or power source (including electricity) used in a clean-fuel vehicle that complies" with the standards established under the Act (Section 241(2), 42 U.S.C. § 7581(2)); and apply only to limited percentages of a fleet operator's covered fleet vehicles (Section 246(b)-(c), 42 U.S.C. § 7586(b)-(c)). Thus, the "clean-fuel fleet" provisions do not authorize States (much less local governments) to limit a fleet operators' ability to choose among the various types of clean-fuel vehicles that otherwise comply with the applicable emission regulations.

Finally, Congress authorized the federal government to excuse a State from its obligation to impose a "clean-fuel fleet" purchasing requirement if the State proposed an alternative approach that would achieve emission reductions equal to those that would be achieved under a fleet purchasing rule. 42 U.S.C. § 7511a(c)(4)(B).

**B. The California Motor Vehicle Emission Regulations.**

California law designates the California Air Resources Board ("CARB") as "the air pollution control agency for all purposes set forth in federal law" (Cal. Health & Safety Code § 39602) and vests CARB with authority to promulgate regulations addressing air pollution resulting from motor vehicles, including limitations on emissions from new motor vehicles and new motor vehicle engines. See *id.* §§ 39003,



43013, 43018, 43100-43108. Three sets of CARB's regulations are relevant here.

1. CARB's low-emission vehicle ("LEV") program, governing low-emission passenger cars and medium-duty vehicles, was adopted in 1990 and 1991 and applies to 1994 to 2003 model-year vehicles. Cal. Code Regs. tit. 13, § 1960.1; Pet. App. 13a; CARB, *Low-Emission Vehicle Program*, at http://www.arb.ca.gov/msprog/levprog/evprog.htm (last updated Oct. 2, 2002). In 1999, CARB adopted "LEV II" rules, which are applicable to the 2004 and later model years. See Cal. Code Regs. tit. 13, § 1960(a); CARB, *Low-Emission Vehicle Program*, at http://www.arb.ca.gov/msprog/levprog/levprog.htm (last updated Oct. 2, 2002). Although the numerical requirements differ, the basic structure of the two programs is substantially similar. The rules establish different tiers of emission regulation, which are, in order of increasing stringency: Transitional Low-Emission Vehicles ("TLEVs"), which include diesel-fueled vehicles; Low-Emission Vehicles ("LEVs"); Ultra-Low-Emission Vehicles ("ULEVs"); Super-Ultra-Low-Emission Vehicles ("SULEVs"); and Zero-Emission Vehicles ("ZEVs"). Each tier has a set of emission limitations for carbon monoxide, formaldehyde, non-methane organic gases, oxides of nitrogen, and particulate matter. Cal. Code Regs. tit. 13, §§1960.1(e)(3), (g), (h)(2), (p) (LEV I); *id.* § 1961(a) (LEV II). A vehicle may be sold in California only if it qualifies under one of these categories. See Cal. Health & Safety Code §§ 43009, 43016-43017, 43102, 43105.

The LEV program further requires that vehicles that a single manufacturer delivers for sale in California must meet overall fleet average emission requirements. These requirements are reduced over time, "requiring manufacturers to sell progressively cleaner mixes of vehicles." Pet. App. 14a; see Cal. Code Regs. tit. 13, § 1960.1(g)(2) (LEV I); *id.* § 1961(b) (LEV II). "Automobile manufacturers, under CARB's regulations, have the flexibility to decide how many vehicles of each

type they manufacture and sell in order to meet the fleet average." Pet. App. 14a. Additional flexibility is provided through establishment of a marketable credit system: manufacturers may earn credits against the non-methane organic gas emission standards by exceeding the fleet average requirements, and against the ZEV requirements by creating Partial Zero-Emission Vehicles ("PZEVs"), reducing carbon dioxide emissions, or increasing fuel efficiency. Cal. Code Regs. tit. 13, § 1960.1(g)(2) (note 7 to appended table of fleet average emission requirements) (non-methane organic gas credits); *id.* § 1961(c)(1) (same); *id.* § 1962(g) (ZEV credits).

In 1993, EPA granted California a waiver of federal preemption under Section 209(b) for the LEV program applicable to light-duty vehicles. 58 Fed. Reg. 4,166 (1993). California's LEV program for medium-duty vehicles received preemption waivers from EPA in 1994 (59 Fed. Reg. 48,625 (1995 and later model years)) and in 1998 (63 Fed. Reg. 18,403 (1998 and later model years)). In April 2003, EPA granted a preemption waiver for California's LEV II amendments as they apply to light-duty and medium-duty vehicles — except with respect to California's ZEV program. 68 Fed. Reg. 19,811. CARB initially sought but later withdrew its requests for EPA consideration of California's ZEV program. 67 Fed. Reg. 60,680 (2002).

In addition to granting California's LEV program a waiver from federal preemption, EPA also approved that program as a substitute for the federal "clean-fuel fleet" program required by Section 246 for "nonattainment" areas in the State. 64 Fed. Reg. 46,849 (1999). But for EPA's approval of California's LEV program as a substitute, six "nonattainment" areas in California, including the South Coast Air Basin, would have been required by Section 246 to adopt federal "clean-fuel fleet" programs. 64 Fed. Reg. 46,850.



2. CARB promulgated an emission control program for heavy-duty urban transit buses (the "Urban Bus Program") in February 2000. See CARB News Release, *ARB Cuts Emissions From Transit Buses* (Feb. 24, 2000), at http://www.arb.ca.gov/newsrel/nr022400.htm (viewed Aug. 18, 2003). One element of the program establishes increasingly stringent emission standards for new urban buses and bus engines. Cal. Code Regs. tit. 13, § 1956.1(a)(6)-(12).

The Urban Bus Program also imposes a ceiling on the average emission level of a bus fleet operated by a public transit agency. CARB nonetheless respected fleet operators' need "to determine their optimal fleet mix in consideration of such factors as air quality benefits, service availability, cost, efficiency, safety, and convenience." Accordingly, CARB established "two paths to compliance with this fleet rule * * *: the alternative-fuel path and the diesel path." Cal. Code Regs. tit. 13, § 1956.2(a).

Operators choosing the diesel path are obligated to retrofit a larger number of existing buses to reduce nitrogen oxide emissions than those choosing the alternative-fuel path (see Cal. Code Regs. tit. 13, § 1956.2(f)(2)-(3)) and must purchase a specified minimum number of zero emission buses (see *id.* § 1956.3(c)). The alternative-fuel path requires that at least 85% of new buses be capable of operating on alternative fuel, which is defined as "natural gas, propane, ethanol, methanol, electricity, fuel cells, or advanced technologies that do not rely on diesel fuel" (*id.* § 1956.2(b)(1)); a lesser retrofit obligation (see *id.* § 1956.2(f)(2)-(3)); and a deferred obligation to purchase zero-emission buses (see *id.* § 1956.3(c)). All operators, regardless of the path selected, must retrofit existing buses to reduce particulate emissions. *Id.* § 1956.2-1956.3; Pet. App. 15a.[1]

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[1] CARB Board Resolution 00-02 at 6 (Feb. 24, 2000), available at http://www.arb.ca.gov/regact/bus/res00-2.pdf (viewed Aug. 18, 2003), (continued...)

3. CARB also has developed an emission control program for heavy-duty vehicles (those over 14,000 pounds in gross vehicle weight rating), including diesel-fueled trucks. Under CARB's Heavy-Duty Vehicle Program, emission limits are established for oxides of nitrogen, non-methane hydrocarbons, particulate matter, and carbon monoxide. Heavy-duty vehicles that CARB certifies as meeting those emission limits may be sold throughout the State. Cal. Code Regs. tit. 13, §§ 1956.8, *et seq.* (2003); CARB, *On-Road Heavy-Duty Vehicle Program*, at http://www.arb.ca.gov/msprog/onroadhd/onroadhd.htm (last updated May 12, 2003).

Significantly, and in recognition of the need for regulatory uniformity in the capital-intensive heavy-duty vehicle market, CARB's Heavy-Duty Vehicle Program standards are largely identical to, and incorporate by reference, the standards EPA has adopted for heavy-duty vehicles. Compare Cal. Code Regs. tit. 13, §§ 1956.8, *et seq.* with 40 C.F.R. Part 86; see also J.A. 163, 165. As a result of these standards, "[heavy-duty] diesel vehicles will [during 2007 to 2010] achieve gasoline-like exhaust emission levels, in addition to their inherent advantages over gasoline vehicles with respect to fuel economy, greenhouse gas emissions, and lower evaporative hydrocarbon emissions." 66 Fed. Reg. 5,005 (2001).

**C. The Challenged Fleet Rules.**

The District is a political subdivision of the State of California. It is a regional entity responsible for "implement[ing] a strategy for achieving and maintaining ambient air quality standards within the South Coast Air Basin," which consists of parts of Los Angeles, San Bernardino, Riverside and

[1](...continued)
directed CARB's Executive Officer to forward the details of the Urban Bus Program to EPA and request "a waiver or confirmation that the regulations are within the scope of an existing waiver" under Section 209(b). According to EPA's on-line docket, however, CARB's waiver request for the Urban Bus Program has not yet been submitted to EPA.



Orange Counties. Pet App. 4a-5a; see Cal. Health & Safety Code § 39052.5, 40402, 40410-40412, 40440-40459. The district court in this case stated that the South Coast Air Basin "experiences the most serious air quality problems in the nation, primarily due to motor vehicle pollution." Pet. App. 5a.

The California legislature in 1987 authorized the District to adopt regulations governing vehicle purchases by operators of "public and commercial vehicle fleets" of 15 or more vehicles. Cal. Health & Safety Code § 40447.5. With some exceptions, the District was permitted to require such operators "to purchase vehicles which are capable of operating on methanol or other equivalently clean burning alternative fuel and to require that these vehicles be operated, to the maximum extent feasible, on the alternative fuel when operating" in the District. *Ibid.*

In June, August and October 2000, the District promulgated a series of six "Fleet Rules" regulating purchases or leases of new vehicles by various private and public operators (including federal, state, regional, county, and city departments and agencies) of commercial fleets to "reduce air toxic and criteria pollutant emissions." J.A. 16. Each of the Rules addresses a separate type of vehicle fleet, but all follow a common approach, prohibiting fleet operators from purchasing many types of new vehicles — including some low-emission vehicles and all diesel-fueled vehicles — that are certified by CARB for sale within California.

For example, Rule 1194 (J.A. 58-65) applies "to all public and private fleet operators of fifteen (15) or more vehicles operated by the airport authority or any other public or private fleet operators that transport passengers from commercial airports located in the District." Rule 1194(b) (J.A. 58). It imposes separate restrictions on different types of transportation providers, as follows:

- For operators "providing limousine or transit shuttle services out of commercial airport terminals to the public

through the collection of fares or fees, or [that] provide courtesy pickup services out of commercial airport terminals," any new passenger car or medium-duty vehicle purchase or lease "shall be a vehicle that has been certified by CARB that meets the ULEV, SULEV, or ZEV emission standards." Rule 1194(d)(1) (J.A. 61-62). These operators are barred from purchasing or leasing other vehicles that also are certified by CARB and therefore permitted to be sold in California — such as those meeting the TLEV and LEV emissions standards. See Cal. Code Regs. tit. 13, § 1960.1(g)(2) (LEV I fleet average requirements permitting sale of TLEVs and LEVs as part of manufacturers total fleet of vehicles); *id.* § 1961(b) (same for LEV II).

• Operators of "shuttle van services that provide multiple-party passenger transportation services to commercial airport terminals and do not operate on fixed or scheduled routes" were subjected to a phased-in requirement: from July 1, 2001, through June 30, 2002, half of their purchases or leases of new passenger cars or medium-duty vehicles were required to be CARB-certified as meeting ULEV, SULEV, or ZEV emission standards; beginning July 1, 2002, all purchases and leases had to meet this standard. Rule 1194(d)(2) (J.A. 62). As noted above (at pages 11-12), CARB's rules permit the purchase and lease within California of new passenger cars and medium-duty vehicles that do not meet these particular standards.

• For providers of "shuttle services to the public in and out of airport terminals to airport parking lots, car rental lots, or hotels/motels, all new heavy-duty transit vehicle purchases or leases shall be alternative-fueled vehicles," (Rule 1194(d)(3) (J.A. 62)), which the Rule defines as a "vehicle or engine that is not powered by gasoline or diesel fuel," (Rule 1194(c)(2) (J.A. 59)). Under CARB's rules, heavy-duty transit vehicles powered by gasoline or diesel



fuel are CARB-certified and may be sold within California. See Cal. Code Regs. tit. 13, § 1956.1(a)(6)-(12).

• Finally, for fleet operators "providing taxicab pickup services out of commercial airport terminals," any new purchase or lease of a passenger car or medium-duty vehicle to perform such services "shall [only] be a vehicle that has been certified by CARB that meets the ULEV, SULEV, or ZEV emission standards" (Rule 1194(d)(4) (J.A. 62-63)), despite the availability of other CARB-certified vehicles, including diesel-powered vehicles (see page 11, *supra*). The Rule provides for an exemption for such operators if the District has failed to make available a subsidy to cover any amount in excess of $10,000 that the operator is required to pay for such a vehicle. Rule 1194(e)(3) (J.A. 63-64).

Rule 1194 contains exemptions for situations in which the operator demonstrates to the District that the vehicle required under the Rule is not available commercially or could not be used; for vehicles converted to be wheelchair accessible; and for buses "used for the express purpose of providing long-distance service." Rule 1194(e)(1)-(2), (4) (J.A. 63-64).

Each of the other Fleet Rules follows the same approach for different types of fleets: public and private street-sweeper fleet operators (Rule 1186.1 (J.A. 16-23)); public fleet operators of passenger cars, light-duty trucks, or medium-duty vehicles (Rule 1191 (J.A. 24-45)); public transit fleet operators (Rule 1192 (J.A. 46-51)); public and private solid waste collection fleet operators (Rule 1193 (J.A. 52-57)); and public fleet operators of heavy-duty vehicles (Rule 1196 (J.A. 66-74)). In each instance, the purchase of certain low-emission vehicles and all covered diesel-fuel vehicles is generally prohibited. See Pet. App. 16a-19a.

**D. The Proceedings Below.**

Petitioner Engine Manufacturers Association commenced this action against respondent SCAQMD in the United States District Court for the Central District of California asserting that the Fleet Rules are preempted by Section 209(a) of the Clean Air Act and seeking an injunction barring the District from enforcing those Rules. Petitioner Western States Petroleum Association intervened as a plaintiff; and respondents Natural Resources Defense Council, Coalition for Clean Air, Communities for a Better Environment, Inc., Planning & Conservation League, and Sierra Club intervened as defendants. Pet. App. 19a-20a.

The district court granted respondents' motion for summary judgment (Pet. App. 3a-27a). The court recognized that the First and Second Circuits had held that state-imposed requirements regarding the sales of motor vehicles constitute a "standard relating to the control of emissions" preempted by Section 209(a). Pet. App. 23a. Nonetheless, the district court stated that "[i]t does not follow, however, that a rule regulating the *purchase* of vehicles is such a standard." *Ibid.* (emphasis in original). "Where a state regulation does not compel manufacturers to meet a new emissions limit, but rather affects the purchase of vehicles, as the Fleet Rules do, that regulation is not a standard. No restriction on the sale of vehicles is present here. Plaintiffs may continue to sell any vehicle which is otherwise certified in California." *Ibid.*

The district court also relied on Section 246's requirement that some States require fleet operators to purchase certain low-emission vehicles. "It is not rational to conclude that the [Clean Air Act] would authorize purchasing restrictions on the one hand, and prohibit them, as a prohibited adoption of a 'standard,' on the other." Pet. App. 23a.

Finally, the district court concluded that Section 177's requirement that a State adopt standards "identical" to California's to be exempt from preemption was not applicable because it referred only to "the non-California 'opt-in' states." Pet. App. 26a. The court also determined that the District's Fleet Rules did not impose a "third car" requirement in violation of Section 177 because "they require purchasers to choose from among a subset of previously certified vehicles. Automobile manufacturers will not be forced to do something more than they already must." Pet. App. 27a. "The Fleet Rules may lead to decreased demand for some cars and trucks certified in California, but the Rules do not require the manufacturers to build or sell any particular model for this area." *Ibid.*



The Ninth Circuit affirmed the judgment "for the reasons stated in" the district court's "well-reasoned opinion." Pet. App. 1a-2a. The court of appeals subsequently denied rehearing. Pet. App. 28a-29a.

## SUMMARY OF THE ARGUMENT

Section 209(a) of the Clean Air Act prohibits any "State or any political subdivision thereof" from "adopt[ing] or attempt[ing] to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines." This provision sweeps broadly and encompasses the emissions-based purchasing restrictions imposed on fleet operators by the Fleet Rules at issue in this case.

The District's Fleet Rules prohibit the purchase of certain new motor vehicles — including all diesel-fueled vehicles — based on the emission characteristics of those vehicles. As a result, the Rules are "standard[s] relating to the control of emissions from new motor vehicles" preempted by Section 209(a). The distinction drawn by respondents and the courts below between purchase prohibitions (which they contend are not preempted) and sales restrictions (which they acknowledge are preempted) finds no support in the text of Section 209(a) or the Clean Air Act's regulatory scheme. Indeed, the distinction

is illusory; every sale includes a purchase and every purchase includes a sale.

The Fleet Rules also expressly refer to and incorporate a subset of the emission standards adopted by CARB. That subset includes only the most stringent and restrictive of the broader range of CARB emission standards and phase-in provisions. The Fleet Rules amount to a new and different set of standards adopted for the undisputed purpose of controlling emissions. If the District can adopt these standards, then other state and local governments can as well. The congressional scheme for regulating mobile sources of emissions would be gutted.

No provision of the Clean Air Act — not the preemption waiver provision for California (Section 209(b)), the "opt-in" provision allowing other States to adopt California emission standards that have been approved by EPA (Section 177), nor the clean-fuel fleet provisions (Section 246) — saves the Fleet Rules from federal preemption. The District is not a State. The Fleet Rules vary from the EPA-approved standards adopted by the State of California. And the Fleet Rules have never been approved by EPA.

## ARGUMENT

The District's Fleet Rules are "standard[s] relating to the control of emissions from new motor vehicles" and are, therefore, preempted by Section 209(a) of the Clean Air Act. The contrary holding of the courts below — based on the conclusion that the Fleet Rules are beyond the reach of Section 209(a) because they proscribe purchases, not sales (see Pet. App. 2a, 23a) — is untenable. It ignores the broad language of Section 209(a), the entire regulatory scheme for controlling motor vehicle emissions under the Clean Air Act, and the purpose and effect of the Fleet Rules themselves.

If the Fleet Rules were not preempted emission standards, then any state or local government could adopt rules permitting



or prohibiting any motor vehicle purchases (whether by fleet operators or individuals) based on the emissions characteristics of those vehicles.[2] The balkanized regulatory scheme that would result is the very sort of "chaotic situation" Congress sought to avoid by preempting state and local regulation of motor vehicle emission standards. See pages 4-7, *supra*. Such localized variation will disrupt "interstate commerce in new motor vehicles" and undermine the regulatory regime created by Congress for mobile sources in Title II of the Act. H.R. Rep. 728, at 21.

### I. SECTION 209(A) ENCOMPASSES RESTRICTIONS ON PURCHASES OF NEW MOTOR VEHICLES SUCH AS THE DISTRICT'S FLEET RULES

Whether the Clean Air Act preempts the Fleet Rules is determined by the text of Section 209(a). Where, as here, a federal statute "contains an express pre-emption clause, [the] task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 62-63 (2002) (quoting *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993)) (internal quotation marks omitted).

The courts below, and respondents, mistakenly relied on a "presumption" against federal preemption of traditional state "police powers" in seeking to narrow the scope of Section 209(a). Pet. App 2a, 9a. But such a presumption has no bearing on this case, where "Congress has made clear its desire for preemption." *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 146 (2001). Moreover, the presumption applies only when Congress legislates "in a field which the States have traditionally occu-

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[2] The statute preempts state and local standards applicable to both "new motor vehicles" and "new motor vehicle engines." For ease of reference, we include both "new motor vehicles" and "new motor vehicle engines" in referring to "motor vehicles."

pied" (*United States* v. *Locke*, 529 U.S. 89, 108 (2000) (quoting *Rice* v. *Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))), and not in a field "where there has been a history of significant federal presence" (529 U.S. at 108). In this case, there is no "tradition" of state regulation of motor vehicle emissions — only a single State had adopted emission standards at the time Congress enacted the relevant provisions of the Clean Air Act. See pages 5-6, *supra*. To the contrary, there have been decades of a "significant federal presence" in the field. *Locke*, 529 U.S. at 108.

The preemption inquiry in this case begins and ends with the text of Section 209(a), which "provides a reliable indicium of congressional intent with respect to state authority." *Cipollone*, 505 U.S. at 517 (internal quotation marks omitted). Section 209(a) plainly demonstrates Congress's intent to preempt regulations like the Fleet Rules.

### A. The Plain Language Of Section 209(a) Establishes That A Rule Barring The Purchase Of New Motor Vehicles Based On Their Emission Characteristics Is A Preempted "Standard Relating To The Control Of Emissions."

The first sentence of Section 209(a) is written in expansive terms: "No State or any political subdivision thereof shall adopt or attempt to enforce ***any standard relating to*** the control of emissions for new motor vehicles or new motor vehicle engines subject to this part." 42 U.S.C. § 7543(a) (emphasis added). This language "largely preempt[s] the field with regard to 'emissions from new motor vehicles.'" *Washington*, 406 U.S. at 114; see also *American Auto. Mfrs. Ass'n* v. *Cahill*, 152 F.3d 196, 198 (2d Cir. 1998) ("Under Section 209 of the Clean Air Act, exclusive control over 'standards relating to the control of emissions from new motor vehicles' is vested in the federal government, and the states are preempted from regulating in the area."); *MVMA*, 17 F.3d at 526 (the "cornerstone of Title II [of



the Clean Air Act] is Congress' continued preemption of state regulation of automobile emissions").

Despite the provision's broad language, the courts below concluded that, although Section 209(a) has been properly construed to preempt state laws regulating sales of new motor vehicles based on the vehicles' emission characteristics,[3] "[i]t does not follow * * * that a rule regulating the *purchase* of vehicles is such a standard." Pet. App. 23a (emphasis in original). That construction of the statute cannot withstand even casual scrutiny in light of the breadth of Section 209(a)'s prohibition against "adopt[ing] or attempt[ing] to enforce any standard relating to the control of emissions," which is evident from each element of the language Congress used in crafting the provision.

*First*, the statute proscribes "***any*** standard." The term "any" generally means a thing "selected without restriction or limitation of choice," and when used as a modifier — as in Section 209(a) — "any" indicates "the maximum or whole of a number or quantity." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 97 (1986). Congress's use of the word "any" in a statute "undercuts a narrow construction" of the provision. *United States* v. *James*, 478 U.S. 597, 605 (1986), abrogated on other grounds by *Central Green Co.* v. *United States*, 531 U.S. 425 (2001); see also *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 588-589 (1980) (Congress's use of the "expansive" term "any" "offer[ed] no indication whatever that Congress intended the limiting construction" of the statute urged by the respondents); *Shea* v. *Vialpando*, 416 U.S. 251, 260 (1974) (interpreting Congress's use of the word "any" to

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[3] See *Ass'n of Int'l Auto. Mfrs.* v. *Commissioner*, 208 F.3d 1, 6-7 (1st Cir. 2000) ("a requirement that a particular percentage of vehicle sales be ZEVs has no purpose other than to effect a general reduction in emissions" and "must be considered 'standards relating to the control of emissions'" for purposes of Section 209(a) (quoting *Cahill*, 152 F.3d at 200)).

indicate that there was "no limitation, apart from that of reasonableness," upon statute's applicability).

*Second*, Congress described the object of the preemption provision in broad terms: "any ***standard***." A "standard" is a "criterion for measuring acceptability" (BLACK'S LAW DICTIONARY 1412-1413 (7th ed. 1999)) and "something that is established by authority, custom, or general consent as a model or example to be followed," *i.e.*, a "criterion" or "test" (WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2223 ). The word "standard" includes not only the more limited terms "law" and "regulation," but also encompasses restrictions that are the functional equivalents of standards as well. That is confirmed by the inclusion by Congress of standards that a State or local government *either* "adopt[s]" *or* "attempt[s] to enforce;" an attempt to enforce a standard never formally adopted is sufficient to trigger preemption.

*Third*, Section 209(a) preempts any standard "***relating to*** the control of emissions from motor vehicles," and Congress's use of the term "relate to" in an express preemption clause signals a "clearly expansive" preemptive intent. *Egelhoff*, 532 U.S. at 146; see also *Barnett Bank of Marion County, NA* v. *Nelson*, 517 U.S. 25, 38 (1996) ("The word 'relates' is highly general, and this Court has interpreted it broadly in other pre-emption contexts."); *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (the phrase "relating to" in a preemption clause "express[es] a broad preemptive purpose").

This Court has interpreted "related to" preemption clauses to invalidate state laws that have a "reference to" or a "connection with" the preempted subject matter. See, *e.g*, *Egelhoff*, 532 U.S. at 147; *California Div. of Labor Standards Enforcement* v. *Dillingham Constr. N.A., Inc.*, 519 U.S. 316, 324 (1997); *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 223 (1995). The "reference to" or "connection with" inquiry is based on whether the state or local law at issue is expressly linked in



some fashion to the subject matter that has been reserved for federal regulation. As the Court explained in *Dillingham*, a "reference" sufficient to establish preemption will be found "[w]here a State's law acts immediately or exclusively upon" the preempted subject matter, or where the preempted subject matter "is essential to the law's operation." 519 U.S. at 325.

To determine whether a state or local law has "the forbidden connection," resort must be had to "the objectives of the [federal statute] as a guide to the scope of the state law that Congress understood would survive," and "the nature of the effect of the state law on [the preempted legislative area]." *Dillingham*, 519 U.S. at 325 (internal quotation marks omitted); see also *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 656 (1995) (the Court looked to "the objectives of the [federal] statute as a guide to the scope of the state law that Congress understood would survive").

In light of these principles, the proscription against "***any standard relating to*** the control of emissions from new motor vehicles" must encompass purchase prohibitions. Whatever the outer limits of Section 209(a)'s preemptive scope, it is plain that a state or local rule that bars the purchase of some new motor vehicles and permits the purchase of others on the basis of the vehicles' respective emission characteristics is well within Section 209(a)'s prohibition. There are only a few ways to regulate motor vehicle emissions. Manufacturers may be barred from producing vehicles that do not meet specified emissions criteria; or sales, purchases, or use of new motor vehicles may be limited on the same basis. Given its expansive language, Section 209(a) necessarily encompasses such direct emission controls.

Certainly, any distinction between sale restrictions and purchase restrictions is nonsensical. Every new vehicle transaction involves the purchase of the vehicle by the purchaser and

has been certified by CARB that meets the ULEV, SULEV, or ZEV emission standards when adding or replacing a passenger car or medium-duty vehicle to their fleet.

(5) Vehicles acquired pursuant to paragraph (d)(4) must be operated within the South Coast Air Quality Management District for a minimum of three years if funding to offset the purchase cost, less $10,000 in accordance with paragraph (e)(3), was made available.

(6) Prior to January 1, 2002, airport fleet operators voluntarily purchasing an alternative-fueled vehicle meeting requirements of paragraph (d)(4) after adoption of this rule, may apply for funding to offset the purchase cost, less $10,000 in accordance with paragraph (e)(3).

**(e) Exemptions**

The provisions of this rule shall not apply to the following:

(1) Buses used for the express purpose of providing long-distance service (out-of-District), that are generally equipped with luggage compartments, restrooms, and overhead storage.

(2) Upon demonstration to the Executive Officer, any vehicles as required pursuant to paragraph (d) for which no alternative-fuel engine and chassis configuration is available commercially or could be used.

(3) An airport fleet operator who provides taxicab pickup services at commercial airport terminals may purchase a light- or medium-duty vehicle that is not certified by CARB as ULEV or cleaner if the SCAQMD or its designated agent has not provided sufficient funding to fully offset the purchase cost of an alternative-fueled vehicle that complies with paragraph (d)(4)



less $10,000 (paid by or on the behalf of the airport fleet operator):

(A) within 10 working days after notification by the airport fleet operator of the intent to purchase such vehicle and the airport fleet operator has provided documentation that the $10,000 is immediately available for purchase of the rule compliant vehicle, or

(B) within two working days after the airport fleet operator has notified the SCAQMD or its designated agent in the event that the taxicab vehicle to be replaced is rendered inoperable due to a roadside accident and would require immediate replacement of the taxicab vehicle. In addition, the airport fleet operator must demonstrate that the $10,000 to be provided by the airport fleet operator is immediately available for purchase of the rule compliant vehicle.

(C) Notwithstanding the provisions in paragraphs (e)(3)(A) or (e)(3)(B), the airport fleet operator shall be responsible to pay for the cost of converting the new rule compliant vehicle to meet applicable taxicab vehicle specifications and all other incidental costs including but not limited to, sales tax on the $10,000 provided by the airport fleet operator, license, and registration fees.

(D) An airport fleet operator qualifying for a non-rule compliant vehicle as provided in paragraphs (e)(3)(A) or (e)(3)(B) shall purchase the non-rule compliant vehicle within 10 working days after being notified that such vehicle could be purchased or reapply for co-funding pursuant to paragraphs (e)(3)(A) or (e)(3)(B).

(4) Vehicles not certified by CARB as ULEV or cleaner that are converted to be wheelchair accessible (to meet regulations set by the Commercial Airport Authority and all Americans with Disability Act of 1990 requirements, including door height overhead clearance as well as ramp or lift design specifications) for the purpose of providing taxicab pickup services at commercial airport terminals.

**(f) Compliance Auditing and Enforcement**

(1) The fleet operator shall provide at the request of the District any files and/or records created to comply with subdivision (d) including fleet-specific purchase information, such as a list of official DMV registrations, and manufacturer, model-year, model, engine family number, and fuel type of each fleet vehicle. The fleet operator shall keep all required records for a minimum of two years.

(2) Any fleet operator seeking an exemption under subdivision (f) shall supply proof that their fleet is exempted from this rule when requested by the District.

**(g) Severability**

If any provision of this rule is held by judicial order to be invalid, or invalid or inapplicable to any person or circumstance, such order shall not affect the validity of the remainder of this rule, or the validity or applicability of such provision to other persons or circumstances. In the event any of the exceptions to this rule is held by judicial order to be invalid, the persons or circumstances covered by the exception shall instead be required to comply with the remainder of this rule.

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South Coast Air Quality Management District

*(Adopted October 20, 2000)*

## RULE 1196. CLEAN ON-ROAD HEAVY-DUTY PUBLIC FLEET VEHICLES

**(a) Purpose**

For public fleets of heavy-duty vehicles operating in the South Coast Air Quality Management (District), this rule requires public fleet operators to acquire alternative-fuel heavy-duty vehicles when procuring or leasing these vehicles to reduce air toxic and criteria pollutant emissions.

**(b) Applicability**

This rule applies to all government agencies located in the District, including federal, state, regional, county and city government departments and agencies, and any special districts such as water, air, sanitation, transit and school districts, with 15 or more heavy-duty vehicles. This rule shall not apply to vehicles or services pursuant to paragraph (f) or vehicles subject to Rules 1192, 1193, [adopted June 16, 2000], 1194 [adopted August 18, 2000], 1195 [*proposal for school buses*] or 1186.1 [adopted August 18, 2000].

**(c) Definitions**

For purposes of this rule, the following definitions shall apply:

(1) ALTERNATIVE-FUEL HEAVY-DUTY ENGINE OR VEHICLE means a heavy-duty vehicle or engine that uses compressed or liquefied natural gas, propane, methanol, electricity, fuel cells, or other advanced technologies that do not rely

on diesel fuel, and has been certified by the California Air Resources Board (CARB).

(2) APPROVED CONTROL DEVICE(S) is a CARB-certified exhaust control device(s) that reduces particulate matter and possibly other precursor emissions. To be considered fitted with an approved control device(s), all diesel exhaust from the vehicle must be vented through such a device(s) that has been fitted at the time of vehicle purchase. The vehicle equipped with such a control device must use diesel fuel with a sulfur content no greater than 15 ppm.

(3) DUAL-FUEL HEAVY-DUTY VEHICLE means a heavy-duty vehicle equipped with a diesel engine that uses an alternative fuel (such as compressed or liquefied natural gas, liquefied petroleum gas, methanol, or other advanced technologies) in combination with diesel fuel to enable compression ignition. A dual-fuel engine typically uses the alternative fuel to supply 85 percent of the total engine fuel requirement on a BTU basis. A dual-fuel engine must be certified by CARB to meet an applicable optional nitrogen oxide exhaust emission standard and be fitted with a particulate matter aftertreatment control device that achieves a particulate matter emissions level no greater than the particulate matter emissions level of the latest certified M-100 methanol engine certified by CARB prior to the date of adoption of this rule.

(4) EMERGENCY OR RESCUE VEHICLE means any vehicle defined in Section 165 of the California Vehicle Code and is equipped with red lights and sirens as defined in Sections 30, 25269, and 27002 of the California Vehicle Code.



(5) FLEET VEHICLE means any heavy-duty on-road vehicle, owned or leased by a public fleet operator that totals 15 or more heavy-duty vehicles excluding vehicles exempt under paragraphs (f)(1) and (f)(2).

(6) HEAVY-DUTY VEHICLE means any vehicle having a gross vehicle weight of at least 14,000 pounds.

(7) PUBLIC FLEET OPERATOR is a person who owns, leases, or operates heavy-duty fleet vehicles in the District. A person is a federal, state, county or city government department or agency, or special district.

(8) SPECIAL DISTRICT means any public agency that provides public services such as, but not limited to, sanitation, school, transit, air, and water districts.

(9) VEHICLE means any self-propelled, motorized device that is permitted to operate on public roads through Department of Motor Vehicle registration or the federal government.

**(d) Fleet Requirements**

Beginning July 1, 2002, for public fleet operators with 15 or more heavy-duty vehicles, all new additions to an existing fleet, or formation of a new fleet, of heavy-duty vehicles shall be by purchase or lease of:

(1) alternative-fuel heavy-duty engine or vehicles;

(2) dual-fuel heavy-duty vehicles;

(3) dedicated gasoline heavy-duty vehicles; or

(4) If the fleet operator has an approved Technical Infeasibility Certification for this purchase or lease, as described in subdivision (e), a diesel-powered heavy-duty engine or vehicle with an approved control device and maintain that approved control device per manufacturer's specifications. The provisions of this section shall not apply to subparagraph (e)(1)(D) after June 30, 2004.

**(e) Technical Infeasibility Certification Criteria and Procedures** –

(1) No less than 60 days prior to the date of purchase or lease of a replacement or additional heavy-duty engine or vehicle, any fleet operator seeking to comply with paragraph (d)(4) shall demonstrate the technical infeasibility of complying with paragraph (d)(1), d(2), or (d)(3) requirements by submitting a signed and dated Technical Infeasibility Certification Request to the Executive Officer and attest to the accuracy of all statements therein, that shall include:

(A) The name and address of the public fleet operator; and

(B) Current heavy-duty vehicle fleet composition, including make, model; and

(C) Demonstration that no engine and chassis/body configuration that meets the requirements of paragraphs (d)(1), (d)(2), or (d)(3) is commercially available from any manufacturer (only technical reasons for choosing a given chassis/body configuration are acceptable) or could be used in a specific application.



(D) Demonstration that an alternative-fuel refueling station for alternative-fueled or dual-fuel heavy-duty vehicles that are commercially available from any manufacturer is not available within five miles of the vehicle storage or maintenance yards, or at locations where vehicles will be home-based for extended periods of time and the refueling supply is provided through mobile means.

(E) Demonstration that vehicles complying with paragraphs (d)(1), (d)(2), or (d)(3) exceed the incremental cost-effectiveness criteria established in accordance with the most recent requirements of the Carl Moyer Program or the Mobile Source Emission Reduction Review Committee Program, whichever is greater.

(2) Within 45 calendar days of receipt of a completed Technical Infeasibility Certification Request submitted pursuant to paragraph (e)(1), the Executive Officer will either approve or disapprove the Request, in writing. The Executive Officer shall disapprove the request if it does not meet the requirements of paragraph (e)(1). If a Technical Infeasibility Certification Request is disapproved by the Executive Officer:

(A) The reasons for disapproval shall be given to the applicant in writing.

(B) Upon receipt of a notice of a disapproved Technical Infeasibility Certification Request, the fleet operator shall comply with paragraph (d)(1), (d)(2), or (d)(3).

(C) The fleet operator may resubmit a Technical Infeasibility Certification Request at any time after receiving a disapproval notification or may apply for a variance with the SCAQMD Hearing Board. (See SCAQMD Regulation V and California Health and Safety Code Sections 42350 through 42372 for information regarding variances.), but must still comply with paragraph (d)(1), (d)(2), or (d)(3) until such time as the Executive Officer approves a Technical Infeasibility Certification Request under paragraph (e)(1) or a variance is given by the SCAQMD Hearing Board.

(3) A Technical Infeasibility Certification Request is subject to a plan filing and evaluation fees as described in Rule 306.

**(f) Exemptions**

The provisions of this rule shall not apply to the following:

(1) Emergency or rescue vehicles operated by local, state, and federal law enforcement agencies, police and sheriffs department, fire department, hospital, medical or paramedic facility, and used for responding to situations where potential threats to life or property exist, including but not limited to fire, ambulance calls, or life-saving calls.

(2) Privately owned or operated heavy-duty vehicle fleets that provide contract services to a public agency. Nevertheless, privately owned or operated heavy-duty vehicle fleets may be required to meet other SCAQMD rules such as Rules 1192, 1193, 1194, or 1186.1.



(3) No more than ten evaluation/test vehicles per fleet, provided by or operated by vehicle manufacturer for testing or evaluation, exclusively.

(4) Any vehicle added to or replacing a vehicle in an existing fleet after the applicable implementation date of this rule, as specified in subdivision (d), as long as the purchase contract for acquisition of such vehicle is signed before the date of adoption of this rule. This exemption does not apply to the execution of options to acquire vehicles where the option is executed after the date of adoption of this rule and where vehicle delivery does not occur until after the applicable implementation date as specified in subdivision (d).

(5) Military vehicles used for tactical operations.

(6) Heavy-duty vehicles used routinely to transport materials in and out of the District.

(7) Heavy-duty vehicles operated and housed by state agencies or special districts in the Riverside County portion of the Mojave Desert Air Basin and located within the District if the vehicles are equipped with approved control devices.

(8) When the remainder of the fleet consists of heavy-duty vehicles that meet the requirements of paragraphs (d)(1) or (d)(2),

(a) For public fleets with greater than 15 but less than 100 heavy-duty vehicles, no more than three (3) heavy-duty vehicles that do not meet the requirements of Subdivision (d) of this rule may be part of the fleet at any given

time. Such vehicles shall be equipped with approved control devices.

(b) For public fleets with 100 or more heavy-duty vehicles, no more than three (3) heavy-duty vehicles that do not meet the requirements of Subdivision (d) of this rule may be part of the fleet and are garaged, housed, parked, stored at any single vehicle storage or maintenance yard at any given time. Such vehicles shall be equipped with approved control devices. A public fleet operator may deploy these vehicles and place them at any one vehicle storage or maintenance yard if the public fleet operator submits a plan to the SCAQMD demonstrating that a proportionate number of such heavy-duty vehicles is reduced at other facilities operated by the public fleet operator.

(9) Heavy-duty vehicles leased for no more than 120 days in any 12-month period by the U.S. Postal Service during the peak winter holiday period.

(10) Heavy-duty vehicles owned or operated by federal agencies, state agencies, county agencies, or special districts whose jurisdiction include areas outside of the District and the heavy-duty vehicles are garaged, housed, parked, stored or operated within the District for no more than 180 days in any 12-month period.

**(g) Compliance Auditing and Enforcement**

(1) The fleet operator shall provide at the request of the District any files and/or records created to comply with subdivision (d) including



fleet-specific information, such as a list of official DMV registrations, principal vehicle location, and manufacturer, model-year, model, and fuel type and usage, of each fleet vehicle. This provision shall not apply for records that have been in existence for more than one year.

(2) Any fleet operator seeking an exemption under subdivision (f) shall supply proof that their vehicle or fleet is exempted from this rule when requested by the District.

**(h) Severability**

If any provision of this rule is held by judicial order to be invalid, or invalid or inapplicable to any person or circumstance, such order shall not affect the validity of the remainder of this rule, or the validity or applicability of such provision to other persons or circumstances. In the event any of the exceptions to this rule is held by judicial order to be invalid, the persons or circumstances covered by the exception shall instead be required to comply with the remainder of this rule.

**SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT**

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**Staff Report**

**Proposed Rule 1191 – Clean On-Road Light- and Medium-Duty Public Fleet Vehicles**

**June 2000**

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some for both manufacturers (who would have to keep track of what could be sold where) as well as purchasers (who would be confused about offerings that could differ from town to town). The District is not a State, and therefore cannot rely upon Section 177.

Second, Section 177 applies only if a State adopts and enforces standards that are "identical to the California standards for which a waiver has been granted for such model year." 42 U.S.C. § 7505(1). The District's standards fail this test as well. As noted above, the Fleet Rules were adopted by the District precisely to achieve an impact different from the CARB rules, which already applied within the geographic area under the District's jurisdiction. See pages 33-34, *supra*; J.A. 141, 152. Far from seeking to mirror the CARB standards, the District's entire purpose was to adopt a different, more restrictive regulatory regime, and it accomplished that goal. That is fatal under Section 177.

For example, CARB's LEV Program consists of two interrelated elements — standards establishing permissible emission levels for each of the four categories of low-emission vehicles, and standards setting the progressively lower average emission level that a manufacturers' fleet (of vehicles sold in the State each year) must meet over time. See Cal. Code Regs. tit. 13, §§ 1960.1(g)(1)-(2), § 1961(a)-(b). When CARB sought EPA approval of its LEV Program, it submitted the emission levels and the implementation mechanism together as a single interrelated program. See 58 Fed. Reg. at 4,166 (referring to amendments to California's "exhaust emission standards and test procedures" as the "California LEV program," and evaluating the disparate standards as one program for purposes of a single waiver request); see also 68 Fed. Reg. at 19,812 (using the same framework of analysis for LEV II amendments). EPA based its approval on the effect of the entire program; it did not review the emission levels alone. See generally 68 Fed. Reg. at 19,812; 58 Fed. Reg. at 4,166.



The District's Fleet Rules allow the purchase of only some of the vehicles that are permitted to be sold under CARB's LEV program, in most cases adopting an immediate prohibition of certain vehicles (typically diesel-fueled vehicles) instead of allowing manufacturers to phase in a mix of vehicles based upon yearly state-wide emission averages. The Fleet Rules also prohibit the purchase of all of the diesel-fueled trucks certified for sale under CARB's Heavy-Duty Vehicle Program. Thus, what the District has done is to take some, but not all, of the CARB emission regulations and combine them with a completely different implementation mechanism.

It is plain that the Fleet Rules are not "identical to the California standards for which a waiver has been granted for such model year," as Section 177 requires. EPA has granted a waiver to *both* the emission standards for the year *and* the fleet average emission standards that apply to the particular model year. The District's attempt to implement only a selected subset of the California standards precludes it from relying upon Section 177.

The district court emphasized that "[t]he Fleet Rules require purchasers to choose from among a subset of previously certified California vehicles." Pet. App. 23a. Several simple examples illustrate why this approach is not permissible under Section 177.

A State could decide on a different selective adoption of California's standards, choosing the CARB emission regulations but not the requirement of progressively lower fleet averages, and defend its decision on the same basis as the District — that it had adopted California standards.

Of course, the effect of such a rule would be quite different from the rules promulgated by CARB. Without the pressure of having to meet increasingly stringent emission levels, manufacturers would have no reason to produce and sell the cleaner vehicles. They could focus all of their efforts on vehicles

satisfying the least restrictive emission standards. That would have substantially different — and adverse — consequences for pollution levels.

On the other hand, a State could choose to adopt only the most restrictive of the CARB emission standards. Eliminating the gradual phase-in period provided by the CARB standards could create a situation in which manufacturers might not have sufficient production to meet demand for vehicles in that State.

Not surprisingly, the lower courts that have considered this question — other than the courts below — have concluded that any deviation from the exact rules adopted by California makes Section 177 inapplicable. See *Ass'n of Int'l Auto. Mfrs.*, 208 F.3d at 7-8 (ZEV sales mandates not identical to California standards are preempted); *American Auto. Mfrs. Ass'n*, 152 F.3d at 199-201 (same).

Under Section 177, a State may adopt standards that differ from the federal standards only if they "are *identical* to the California standards." 42 U.S.C. § 7507 (emphasis added). Here, of course, the Fleet Rules are not identical to the California standards. As noted above, their very purpose is to be more restrictive. Moreover, Section 177 expressly prohibits a State that adopts the California standards from limiting — whether directly or indirectly — the "sale of a new motor vehicle * * * that is certified in California as meeting California standards." *Ibid.* But that is precisely the function of the Fleet Rules, which limit the sale of various vehicles (including diesel-fueled vehicles) that do meet the California standards.

**C. Section 246.**

As discussed above (at pages 31-33), Section 246 does not generally authorize States to adopt purchasing restrictions; rather, it preserves against Section 209(a) preemption any fleet purchasing requirements that satisfy the procedural and



substantive standards set forth in Section 246. Because the Fleet Rules do not comply with these standards, they are preempted.

The Fleet Rules were not submitted to EPA for approval as part of California's state implementation plan revision, as required by Section 246. Indeed, California did not submit *any* fleet purchasing program in its implementation plan revision. California instead exercised its option under Section 182(c)(4)(B) of the Act, 42 U.S.C. § 7511a(c)(4)(B), to submit its LEV Program as a substitute in place of a Section 246 fleet purchasing program, and EPA approved the substitution finding that the LEV Program would achieve substantially greater emission reductions. See 64 Fed. Reg. 46,849, 46,851 (1999) (Table 1) (forecasting LEV program emission benefits in excess of those that would be achieved by the federal clean-fuel fleet program). Because the Fleet Rules were not even submitted to (let alone approved by) EPA, respondents cannot rely on Section 246.

Moreover, the Fleet Rules could not otherwise be authorized by Section 246 because the terms of the Fleet Rules are squarely inconsistent with the plain language of Section 246(d), which states that a plan revision establishing a fleet purchase program "shall provide that the choice of clean-fuel vehicles and clean alternative fuels shall be made by the covered fleet operator * * *." The Act defines "clean-fuel vehicle" as a vehicle that "has been certified to meet * * * the clean-fuel vehicle standards" applicable under the statute. 42 U.S.C. § 7581(7). Thus, federal law requires Section 246 fleet purchasing programs to preserve the fleet operator's freedom to choose from among all of the low-emission and diesel-fueled vehicles permitted to be sold. The Fleet Rules, however, do not allow a fleet operator to choose to purchase vehicles from among all of the low-emission vehicles permitted to be sold under California law. Rather the Fleet Rules prohibit operators from purchasing certain low-emission (and all diesel-fueled) vehicles that

comply with the applicable emission regulations and that are offered for sale in California.

In sum, the Fleet Rules fail to comply with numerous requirements of Section 246 and accordingly are not protected against preemption under Section 209(a).

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 2003

Supreme Court, U.S.
FILED
NOV 17 2003
OFFICE OF THE CLERK

No. 02-1343

IN THE

# Supreme Court of the United States

ENGINE MANUFACTURERS ASSOCIATION AND WESTERN STATES PETROLEUM ASSOCIATION,
*Petitioners*,

*v.*

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, ET AL.,
*Respondents.*

***ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT***

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## QUESTION PRESENTED

Whether section 209(a) of the Clean Air Act, 42 U.S.C. § 7543(a), preempts state and local clean air regulations that enhance the market for cleaner fleet vehicles, such as urban transit buses, without imposing any production mandates or other obligations on manufacturers.

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IN THE

# Supreme Court of the United States

No. 02-1343

ENGINE MANUFACTURERS ASSOCIATION AND WESTERN STATES PETROLEUM ASSOCIATION,
*Petitioners,*

*v.*

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, ET AL.,
*Respondents.*

***ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT***

## BRIEF FOR RESPONDENT SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

## INTRODUCTION

In 1999 a new study established that diesel exhaust accounted for 70% of the carcinogenic toxins in the air breathed by the inhabitants of the Los Angeles Basin—which, to this day, remains the only ozone "extreme nonattainment" area in the country. *See* JA 81-84, 258-274. This case presents two different views of how our federalist system should respond to such crises. Petitioners argue that the Clean Air Act creates a centralized command-and-control regime under which the federal government, rather than the affected states or localities, must play the lead role in alleviating region-specific pollution problems—even with respect to measures that enhance the regional market for cleaner motor vehicles. The courts below, in contrast, held

that states and localities retain their inherent authority to create targeted solutions to regional problems so long as they do not require *manufacturers* to produce vehicles with particular emissions characteristics. Resolution of this dispute will have immense significance both within and outside of California because, as this Court has observed, "measures which might be adequate to deal with pollution in a city such as San Francisco, might be grossly inadequate in a city such as Phoenix, where geographical and meteorological conditions trap aerosols and particulates." *Washington* v. *General Motors Corp.*, 406 U.S. 109, 116 (1972).

Congress did not intend to hamstring states and localities in their efforts to respond flexibly and promptly to local air-quality problems—and, in particular, it did not foreclose the fleet purchasing regulations at issue in this case. The Clean Air Act establishes a federal-state partnership to combat the "mounting dangers to the public health and welfare" posed by air pollution. 42 U.S.C. § 7401(a)(2). For the most part, Congress preserved the states' inherent authority to combat air pollution within their borders, an authority that "falls within ... even the most traditional concept of what is compendiously known as the police power." *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440, 442 (1960); *see also* 42 U.S.C. § 7416. The preemption provision at issue here—section 209(a) of the Act—is an important but narrow exception to this retained power, designed to protect manufacturers from the burden of having to comply with 50 different state "standard[s] relating to the control of emissions from new motor vehicles." 42 U.S.C. § 7543(a).

As discussed below, the "standards" that section 209(a) preempts are the same type of *production mandates* that the federal government itself imposes on manufacturers under section 202 of the Act, also under the name "standards": *i.e.*, requirements that the vehicles that manufacturers produce meet particular emissions criteria, individually or on average. *See* 42 U.S.C. § 7521. Section 209(a) does not preempt the fleet purchasing rules at issue here, because those rules impose no production mandates (or any other obligation, for that matter) on manufacturers; instead, they require the operators of certain vehicle fleets within the Los Angeles Basin to choose among the cleaner types of California-approved motor vehicles if, *and only if*, they are commercially available. This conclusion is faithful to the statutory text and structure, and it is fully consistent with the long-standing views of the Environmental Protection Agency ("EPA"), whose absence from the Justice Department's amicus brief is perhaps as telling as it is irregular.



The gist of petitioners' contrary argument is that, with a single exception inapplicable here, section 209(a) categorically preempts any state or local environmental regulation that contains an "express reference to," or is "linked in some other manner to[,] control of motor vehicle emissions." Pet. Br. 28. That position would unhinge the scope of preemption under section 209(a) from the scope of federal "standard"-setting under section 202. Indeed, carried to its logical conclusion, petitioners' position would require the elimination of myriad state and local programs whose validity has never been seriously questioned, such as the many incentive programs that condition tax benefits on the purchase of cleaner vehicles. As the Justice Department concedes (U.S. Br. 17 n.4), section 209(a) does "not generally reach state voluntary or incentive programs that merely encourage vehicle manufacturers to sell, or consumers to buy, vehicles with particular emission characteristics." Yet these programs would fall prey to petitioners' view of section 209(a) because they make "express reference to" emission characteristics (Pet. Br. 28)—indeed, they condition valuable consumer benefits on them.

Drawing the line instead between prohibited production mandates for manufacturers, on the one hand, and permissible purchasing restrictions and incentive programs for consumers, on the other, establishes a sensible rule of decision that courts can easily administer. And it appropriately balances the interests of manufacturers against those of states and localities—both inside and outside of California—that wish to limit their number of pollution-choked "Code Red"

days. Petitioners express concern (Br. 26) that purchase restrictions, if widely adopted, would become indistinguishable from production mandates. But Congress itself has refuted that logic in a closely related provision of the Clean Air Act. As EPA has explained, Congress's desire to spur the introduction of clean-fuel vehicles presented "a clear choice between two alternatives: [1] requiring auto manufacturers *to produce* and sell [clean-fuel vehicles], or [2] creating a market for [clean-fuel vehicles] . . . by requiring fleet operators *to purchase* such vehicles[.]" 63 Fed. Reg. 20103, 20105 (Apr. 23, 1998) (emphasis added) (App. 49a).[1] In designing the federal fleet purchasing program in section 246, 42 U.S.C. § 7586, Congress attributed decisive significance to that distinction and, to protect the interests of manufacturers, chose the latter option. The same distinction is equally workable, and equally consistent with congressional intent, as a means of delimiting the scope of section 209(a).

## STATEMENT

### A. The Clean Air Act

The Clean Air Act ("CAA" or "Act"), 42 U.S.C. §§ 7401-7671q, creates a cooperative federal-state framework "in the struggle against air pollution." *General Motors Corp.* v. *United States*, 496 U.S. 530, 532 (1990). Congress instructed EPA to establish national ambient air quality standards for pollutants that "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." CAA § 108, 42 U.S.C. § 7408(a)(1)(A). And Congress directed state and local governments to formulate ways to attain these federal air quality standards. *See* CAA § 110, 42 U.S.C. § 7410.

Because pollutants originate from a variety of mobile and stationary sources, CAA § 108, 42 U.S.C. § 7408(a)(1)(B), the Act requires each state to create a "state implementation plan," or "SIP," for the regulation of all such sources. CAA § 110, 42 U.S.C. § 7410; *see also Train* v. *Natural Res. Def. Council, Inc.*, 421 U.S. 60, 68 (1975) (describing SIP regime as "a comprehensive planning task of the first magnitude"). Motor vehicle exhaust contributes heavily to air pollution in many parts of the country, releasing into the atmosphere such toxins as carbon monoxide, nitrogen oxide, and ozone. *See* S. Rep. No. 101-228, at 82-86 (1989) (noting that "mobile vehicles are the largest source of ozone and carbon monoxide pollution"). Congress has required states with "nonattainment areas"—*i.e.*, areas whose air quality fails national air quality standards—to adopt specific mobile source pollution programs. *See, e.g.*, CAA § 182, 42 U.S.C. § 7511a(b)(4), (c)(5).

More broadly, Congress has recognized that air pollution control "is the primary responsibility of States and local governments" and has confirmed its intent "to encourage and assist the development and operation of regional air pollution prevention and control programs." CAA § 101, 42 U.S.C. §§ 7401(a)(3), (b)(4). To that end, in section 116 of the Act, Congress has affirmed the states' traditional authority to "adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution." 42 U.S.C. § 7416. This case concerns the scope of a statutory exception to that general rule with respect to "standards" for the control of motor vehicle emissions.

In 1957 California became the first state to undertake "[c]omprehensive statewide efforts" to control motor vehicle emissions. *Motor & Equip. Mfrs. Ass'n* v. *EPA*, 627 F.2d 1095, 1109 n.26 (D.C. Cir. 1979). Those efforts ultimately included "production mandates" for manufacturers: *i.e.*, obligations that the vehicles they built and sold had devices that could attain particular emissions characteristics. *See* S. Rep. No. 90-403, at 33 (1967) (discussing "California's experience with lower standards which will require new control systems and design"). In 1965, Congress followed California's example by enacting section 202 of the Clean Air

[1] This and other relevant materials, including the referenced provisions of the Clean Air Act, are attached as an Appendix to this brief.

Act, authorizing for the first time the creation of federal "standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines." 42 U.S.C. § 7521(a)(1). Like California's production mandates, the federal "standards" of section 202 are also directed at motor vehicle manufacturers, requiring that the vehicles they produce meet certain numerical or technology-based emission levels. *See, e.g.*, 42 U.S.C. § 7521(a)(3)(B)(2) (regulations for certain model years "shall contain standards that [oxides of nitrogen] emissions may not exceed 4.0 grams per brake horsepower hour").

Following enactment of section 202, California and other states either continued to enforce or proposed to implement their own motor vehicle emission standards. *See infra* p. 21 & note 7. The automobile industry expressed concern about the costs of complying with the divergent production mandates of the federal government and, potentially, dozens of states. *See, e.g.*, Senate Rep. No. 90-403, at 33 ("The auto industry . . . was adamant that the nature of their manufacturing mechanism required a single national standard in order to eliminate undue economic strain on the industry."). Congress responded in 1967 with the enactment of the preemption provision at issue in this case: section 209(a). *See* 42 U.S.C. § 7543(a).

Section 209(a) federalizes the field of emissions-related production mandates, thereby marking an important, but limited, exception to the states' retained authority to regulate the sources of air pollution. Specifically, section 209(a) bars states and localities from adopting or attempting to enforce "any standard relating to the control of emissions from new motor vehicles." *Id.* The debate over section 209(a) sharpened the differences "between the states, which wanted to preserve their traditional role in regulating motor vehicles, and the manufacturers, which wanted to avoid the economic disruption latent in having to meet fifty-one separate sets of emissions control requirements." *Motor & Equip. Mfrs. Ass'n*, 627 F.2d at 1109. By preventing states from enacting their own versions of the "standards" imposed



by the federal government in section 202, but not from implementing emissions policies more generally, Congress shielded the motor vehicle industry from conflicting production mandates while leaving states with sufficient flexibility to respond to local motor vehicle pollution problems. *See Allway Taxi, Inc.* v. *City of New York*, 340 F. Supp. 1120, 1124 (S.D.N.Y.) ("[B]oth the history and text of the Act show that the . . . preemption section was made not to hamstring localities in their fight against air pollution but to prevent the burden on interstate commerce which would result if, instead of uniform standards, every state and locality were left free to impose different standards for exhaust emission control . . . for the manufacture and sale of new cars."), *aff'd*, 468 F.2d 624 (2d Cir. 1972).

Congress qualified the application of section 209(a) to California in one key respect. In recognition of that state's "unique problems and pioneering efforts" in the field of air-pollution regulation (S. Rep. No. 90-403, at 33), section 209(b) authorizes California to apply to EPA for a waiver of preemption so that it can establish "standards" of its own that depart from the federal government's standards. 42 U.S.C. § 7543(b). Section 209(b) provides that California's "standards" must be "consistent with section [202]" and as "protective of public health and welfare as applicable Federal standards." *Id.* § 7543(b)(1). The upshot is that only the federal government and, to the extent permitted by EPA, California may adopt and enforce "standards" for the control of emissions from new motor vehicles or engines. The motor vehicle industry is thus required to comply only with those two standards in designing and producing motor vehicles. *See* CAA §§ 202, 209, 42 U.S.C. §§ 7521(a), 7543(b).

In 1977 Congress further amended the Clean Air Act to add section 177, which permits any state to adopt EPA-approved California "standards" as its own. *See* 42 U.S.C. § 7507. To protect the motor vehicle industry from the specter of new production mandates, however, section 177 provides that the "standards" of opt-in states must be "identical" to those of California. *Id.* "States exercising this sec-

tion 177 option may not, in such adoption and enforcement, create a 'third vehicle[ ]' that is not a California vehicle or a 49-state Federal vehicle[ ], because of the burden it would place on the motor vehicle manufacturers." *A Legislative History of the Clean Air Act Amendments of 1990*, Senate Comm. on Public Works, 103d Cong., 1st Sess., Serial No. 103-38, at 1787 (1993) ("*1990 Legislative History*").

Finally, in 1990 Congress added a requirement that states with particular "nonattainment" areas meet their federal clean air obligations either (i) by adopting a federal program, set forth in section 246, for reducing the emissions of fleet vehicles, *see* 42 U.S.C. § 7586, or (ii) by formulating an alternative program that achieves the same ozone and carbon monoxide reductions, *see* CAA § 182, 42 U.S.C. § 7511a(c)(4)(B). The default federal program imposed in section 246 requires covered fleet operators (those with 10 or more vehicles) to purchase a specified percentage of clean-fuel vehicles and to run them with clean alternative fuels. *See id.* § 7586(b). EPA has explained that "Congress made a clear choice" in section 246 to "creat[e] a market for [clean-fuel vehicles]...by requiring fleet operators *to purchase* such vehicles" rather than to "requir[e] auto manufacturers *to produce* and sell" such vehicles. 63 Fed. Reg. at 20105 (emphasis added) (App. 49a). Senator Carl Levin of Michigan likewise noted that the fleet purchasing requirements of section 246 were "carefully designed to avoid ... mandated production and sales," even though they certainly do "create a substantial demand for [clean vehicles], giving motor vehicle manufacturers a real incentive to bring them into production." *1990 Legislative History*, at 7209.

### B. The Fleet Rules

The California Air Resources Board, known as "CARB," is the state agency that exercises California's authority under section 209(b) to seek waivers for California-specific emission "standards." *See* Cal. Health & Safety Code §§ 39003, 39601, 39602. For light- and medium-duty vehicles, CARB has adopted—with EPA's approval—several "tiers" of motor vehicle emission standards: transitional low-



emission vehicles ("TLEV"), low-emission vehicles ("LEV"), ultra-low-emission vehicles ("ULEV"), super-ultra-low-emission vehicles ("SULEV"), and zero-emission vehicles ("ZEV"). Each tier is assigned a set of numerical emission levels for specific motor vehicle pollutants. *See* Cal. Code of Regs., tit. 13, §§ 1960.1, 1961. Manufacturers may produce vehicles in any of the tiers so long as they meet an overall average emissions level. *See id.* For heavy-duty vehicles, CARB has promulgated both general emission standards, *see id.* § 1956.8, and more stringent standards for urban transit buses, *see id.* §§ 1956.1, 1956.2. These CARB programs include "phase-in" requirements designed to create a steady increase in the production of cleaner vehicles. *See id.* §§ 1960.1, 1961, 1956.8.

Respondent South Coast Air Quality Management District ("District"), a political subdivision of California, is "the sole and exclusive local agency within the South Coast Air Basin with the responsibility for comprehensive air pollution control." Cal. Health & Safety Code § 40412; *see generally id.* §§ 40400-40540. The largest agency of its kind, the District is responsible for the air quality of the nearly 15 million people who live in the greater Los Angeles metropolitan area, including major portions of the counties of Los Angeles, Orange, Riverside, and San Bernardino. *See id.* §§ 40410, 40412. The District is governed by a board of 12 members, nine of whom are elected city and county officials. *See id.* §§ 40420-40423.

Southern California has, to say the least, unique and severe air pollution problems. Indeed, the Los Angeles Basin is the only area of the United States designated in "extreme nonattainment" of the national air quality ozone standards. CAA § 181, 42 U.S.C. § 7511(a); 40 C.F.R. § 81.305. For the most part, this is because of motor vehicle exhaust: "[a]utomobiles have single-handedly ruined the atmosphere of Los Angeles." David P. Currie, *Motor Vehicle Air Pollution: State Authority and Federal Preemption*, 68 Mich. L. Rev. 1083, 1084 (1970). Of necessity, the District has become a leader in creating and implementing new air pollution con-

trol programs. *See* 59 Fed. Reg. 48664, 48681-48682 (Sept. 22, 1994).

In 1987 the California legislature gave the District, among its other powers, authority to adopt "fleet rules" governing the purchase of public and commercial fleets of 15 or more vehicles, such as urban transit buses, garbage trucks, and airport shuttles operating within the South Coast District. Cal. Health & Safety Code § 40447.5. The District adopted the Fleet Rules at issue in this case 13 years later, shortly after CARB listed "particulate emissions from diesel-fueled engines" as "toxic air contaminant[s]," Cal. Code Regs. tit. 17, § 93000, and after publication of startling new data showing that fully 70% of the airborne cancer risk to residents of the Los Angeles Basin could be traced to diesel exhaust, JA 81-84, 258-274.

The Fleet Rules (JA 16-74) require certain fleet operators to obtain low-emission or alternative-fuel vehicles—rather than diesel-fuel vehicles—that have been approved by CARB. The vehicles meeting those requirements are thus a subset of the vehicles currently available and certified for use in California. *Id.* at 219. The Fleet Rules govern public entities with fleets of light- and medium-duty passenger vehicles (Rule 1191); public entities with fleets of public transit vehicles or urban buses (Rule 1192); public and private entities with fleets of solid waste collection vehicles (Rule 1193); public and private entities with fleets of passenger airport transportation vehicles, including shuttle and taxicab pickup services (Rule 1194); public and private entities with fleets of street sweepers (Rule 1186.1); and public entities with fleets of heavy-duty vehicles (Rule 1196). To ease compliance, several of the Fleet Rules did not go into effect until almost a year after their enactment. *Id.* at 19, 54, 68. The vast majority, but not all, of the affected fleets are owned and operated by California public agencies. *Id.* at 24, 46, 66.

The Fleet Rules exempt fleet operators from purchasing the designated types of low-emission or alternative-fuel vehicles when they can show that such vehicles are not



commercially available, in which event the operators are free to buy any other CARB-certified vehicle. JA 21-22, 30, 50, 55, 63, 69-71. Even where designated vehicles are available, fleet operators may, in some circumstances, receive an exemption if they show that those vehicles are not cost-effective or useful. *E.g.*, *id.* at 69-70. Significantly, the Fleet Rules impose no production mandates or any other requirements on manufacturers. The only such mandates are those imposed by the federal government and, with EPA's approval, CARB.

### C. Proceedings Below

In August 2000 petitioner Engine Manufacturers Association sued the District, alleging that the Fleet Rules are preempted by sections 209 and 177 of the Clean Air Act. JA 5. Petitioner Western States Petroleum Association intervened as a plaintiff, and respondents Coalition for Clean Air, Inc., Natural Resources Defense Council, Inc., Communities for a Better Environment, Inc., Planning and Conservation League, and Sierra Club intervened as defendants. *Id.* at 5, 6.

On cross-motions for summary judgment, the district court granted summary judgment to respondents and upheld the Fleet Rules. Pet. App. 3a-27a. Based upon the undisputed evidence, it found that the Los Angeles Basin has "the most serious air quality problems in the nation," that "[o]n-road motor vehicles . . . are a principal source of toxic pollution," and that "[t]he presence of high quantities of fine particles in the air has been shown to lead to higher mortality rates, greater occurrences and severity of asthma, cardiovascular disease, and potentially to a higher incidence of cancer." *Id.* at 5a-6a. The Clean Air Act, the court continued, "makes clear that the states retain the leading authority in regulating matters of health and air quality." *Id.* at 8a. The court also determined that, under this Court's precedents, section 209(a) "must be narrowly and strictly construed" because it addresses the states' historic police powers. *Id.*

The district court held that the Fleet Rules "do not set 'a standard relating to the control of emissions,'" as proscribed by section 209(a), because they "impose no new emission requirements on manufacturers whatsoever, and therefore do not run afoul of Congress's purpose behind motor vehicle preemption: namely, the protection of manufacturers against having to build engines in compliance with a multiplicity of standards." Pet. App. 21a. The court contrasted the Fleet Rules to the ZEV sales-quota programs of New York and Massachusetts, which were considered "standards" because they "mandated that a [certain] specified percentage of cars sold by manufacturers in any model year be ZEVs." *Id.* at 22a-23a (discussing *Association of Int'l Auto. Mfrs., Inc.* v. *Commissioner, Mass. Dep't of Envtl. Prot.*, 208 F.3d 1, 7 (1st Cir. 2000), and *American Auto. Mfrs. Ass'n* v. *Cahill*, 152 F.3d 196, 200 (2d Cir. 1998)). "Rather than imposing any numerical control on new vehicles," the court reasoned, the Fleet Rules "regulate the purchase of previously-certified vehicles" and leave manufacturers free "to sell any vehicle which is otherwise certified in California." *Id.* at 21a, 23a.

The court of appeals affirmed on the basis of the district court's opinion. *Id.* at 1a-2a.

## SUMMARY OF ARGUMENT

Section 209(a) provides: "No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines[.]" Despite petitioners' labored exegesis of various words in that sentence, it is common ground that section 209(a) cannot preempt the Fleet Rules unless, among other things, those Rules constitute "standards." As the Justice Department notes (U.S. Br. 15), that term has "varied usage[s] . . . throughout the Clean Air Act," and its meaning within section 209(a) must be discerned "primarily by context" and the statutory structure.

Here, the only way to make sense of the statutory scheme is to construe the "standards" preempted under section 209(a) as coextensive with the types of "standards" that the federal government itself imposes under section 202 of the Clean Air Act: *i.e.*, production mandates that require manufacturers to ensure that the vehicles they produce have particular emissions characteristics, whether individually or in the aggregate. EPA itself put it best in 1999 when, in response to a primary jurisdiction referral, it declared that a "standard" for purposes of section 209(a) is a "requirement to produce a certain number or percentage of vehicles ('production requirement') to meet a numerical emissions limitation"; that this "requirement to produce vehicles is in fact part of the emission standard"; and that "[t]his combination of an emissions limit and a requirement to produce vehicles meeting that limit is key to evaluating certain central issues in standard setting." Letter from Gary S. Guzy (EPA) to the Honorable Thomas F. Reilly, Sept. 15, 1999, at 8-9 (App. 70a-72a).



Section 209(a) thus preempts state-level production mandates, but not regulations and policies that—like state incentive plans or these fleet purchase requirements—merely enlarge the market for cleaner vehicles by creating greater demand for them. Petitioners' much broader view of the "standards" preempted by section 209(a) would unmoor that term from its meaning in section 202 and would give rise to needless interpretive anomalies in the relationships between section 209(a) and 209(b) and between the first and second sentences of section 209(a) itself. Petitioners' reading also flies in the face of the traditional "presumption against the pre-emption of state police power regulations," which requires "a narrow interpretation" even of express preemption provisions. *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks and citation omitted).

Quite apart from these textual considerations, petitioners' theory of section 209(a) is untenable because it is irremediably overbroad. As the Justice Department concedes (U.S. Br. 17 n.4), section 209(a) cannot plausibly be read to preempt the many existing state and local programs that

give purchasers substantial incentives to buy cleaner vehicles and that therefore, in practice, encourage manufacturers to produce more of them. For preemption purposes, there is no valid distinction between those presumptively valid incentive programs and the fleet purchasing restrictions at issue here. Although the Fleet Rules (unlike incentive programs) impose direct requirements on purchasers, the relevant question under the Clean Air Act is whether the program at issue imposes compulsory duties on *manufacturers*. Like incentive programs, the Fleet Rules impose no such obligation. To be sure, also like incentive programs, the Fleet Rules may "encourage vehicle manufacturers to sell ... vehicles with particular emission characteristics" (U.S. Br. 17 n.4) to accommodate increased demand. But that is not the test, as the Justice Department acknowledges (*id.*); if it were, incentive programs would all be preempted. And, from a manufacturer's perspective, there is no reason in principle why a locality's fleet purchasing requirements should be any more or less likely to have that demand-side effect than a successful incentive program—particularly where, as here, the fleet purchasers can invoke an exemption whenever the specified vehicles are commercially unavailable.

In sum, section 209(a) draws the line between, on the one hand, preempted production mandates that compel manufacturers to conform the vehicles they produce to certain emission or fuel requirements and, on the other hand, non-preempted programs that merely encourage manufacturers to produce such vehicles by enlarging the market for them. Although petitioners criticize this line as "nonsensical" (Br. 25), it is anything but; indeed, it is the very line Congress separately drew in designing the federal fleet program under section 246 of the Act. As EPA has explained, Congress's desire to promote the introduction of clean-fuel vehicles presented "a clear choice between two alternatives: requiring auto manufacturers *to produce* and sell [clean-fuel vehicles], or creating a market for [those vehicles] ... by requiring fleet operators *to purchase* such vehicles[.]" 63 Fed. Reg. at 20105 (emphasis added) (App. 49a). Congress chose



the latter approach, rather than the former, to balance the interests of manufacturers against its environmental objectives. Section 209(a) is properly read to serve the same goal by drawing the same line—*i.e.*, between permissible demand-side regulation of purchasing decisions and impermissible production mandates imposed directly on manufacturers. Any concern about the long-run merits of that line should be addressed to the political branches, not to the courts.

Petitioners suggest—for the first time in this Court—that the federal fleet program *itself* somehow preempts state and local alternatives to that program. Any such argument is waived and, in all events, is implausible on the merits. Section 246 *requires* states with non-attainment areas to adopt either the federal fleet program or some EPA-approved alternative; it does not purport to *authorize* states to adopt otherwise preempted programs, because no such authorization is needed. And petitioners' grab bag of other statutory provisions is similarly unhelpful to their position. Section 177 does not apply to the District; it would not preempt these Fleet Rules even if they had been adopted by some state or locality outside of California; and it would not be anomalous in any event to shield California and its political subdivisions from the preemptive effect of that provision, given California's special status as the locus of unique pollution problems and as the pioneer of clean air initiatives. Finally, the savings clause of section 209(d) confirms that states may "restrict the use" of motor vehicles in various respects and, as such, does not remotely speak to the scope of section 209(a)'s preemption of "standards."

There is also no merit to the suggestion that section 209(a) should be construed expansively because California may seek EPA approval of otherwise preempted clean air regulations under section 209(b). The expansive interpretation of section 209(a) that petitioners advocate would have nationwide application, and 49 of the 50 states aggrieved by that interpretation would find no solace in the California-specific provisions of section 209(b). In all events, the

threshold question is whether a state program imposes a "standard." If it does not, it would be both unnecessary and inimical to principles of state sovereignty to force states to seek prior approval from federal regulators before implementing environmental programs designed to suit local needs and achieve federally-mandated overall air-quality targets. Nothing in section 209(a) strips the states of their core sovereign authority to address such local concerns through environmental initiatives other than production mandates.

## ARGUMENT

### THE FLEET RULES ARE PERMISSIBLE BECAUSE THEY ENHANCE THE MARKET FOR CLEAN-FUEL VEHICLES WITHOUT IMPOSING PRODUCTION MANDATES ON MANUFACTURERS.

#### I. THE "STANDARDS" PREEMPTED UNDER SECTION 209(a) ARE THE SAME TYPE OF "STANDARDS"—PRODUCTION MANDATES—THAT THE FEDERAL GOVERNMENT IMPOSES ON MANUFACTURERS UNDER SECTION 202.

The scope of section 209(a)'s prohibition on state or local "standards" is coextensive with the type of production mandates that the federal government itself imposes on manufacturers under section 202 of the Clean Air Act, also under the name "standards." As discussed below, that construction: (1) is consistent with the most applicable dictionary definition of the term; (2) is the only way to make sense of the statutory structure as a whole; (3) follows EPA's own consistent understanding of the term for purposes of both sections 202 and 209(b); (4) avoids the interpretive anomalies that petitioners' alternative construction would produce; and (5) remains faithful to this Court's rule favoring a narrow construction of express preemption clauses in cases of ambiguity.

1. "Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise



of even the most traditional concept of what is compendiously known as the police power." *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440, 442 (1960). Historically, the states played the predominant role in mitigating air pollution from all sources, including motor vehicle exhaust. California, for example, preceded the federal government by a number of years in subjecting manufacturers to standards for reducing motor vehicle emissions. *See Motor & Equip. Mfrs. Ass'n* v. *EPA*, 627 F.2d 1095, 1108-09 & nn.25, 26 (D.C. Cir. 1979).[2] The Clean Air Act builds upon the states' traditional police powers and makes them and the federal government "partners in the struggle against air pollution." *General Motors Corp.* v. *United States*, 496 U.S. 530, 532 (1990). To that end, the Act generally preserves the states' authority to "adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution." CAA § 116, 42 U.S.C. § 7416.

Section 209(a) is a limited exception to this retained authority, preempting any "standard relating to the control of emissions from new motor vehicles." 42 U.S.C. § 7543(a). The principal question in this case is the meaning of the word "standard" as it appears in this provision. Stated simply, if a state or local rule does not qualify as a "standard," it falls outside the preemptive scope of section 209(a). Petitioners devote many pages to a sweeping interpretation of the term "relating to" in the clause following the word "standard"—an interpretation that contradicts this Court's consistent recognition, in cases after *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992), of the inevitable

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[2] By 1963—two years before the federal government first enacted motor vehicle emission control standards—40 states had begun to address air pollution, with seven of those states plus the District of Columbia specifically targeting motor vehicle emissions. *See* U.S. Dep't of Heath, Education and Welfare, *A Digest of State Air Pollution Laws* (1963 ed.), at 11-19 (California), 39 (Colorado), 46 (District of Colombia), 92 (Indiana), 94 (Kansas), 115 (Michigan), 124 (New Hampshire), 139 (New York).

need for a narrow construction of "relating to" clauses.[3] But this Court need not revisit the meaning of such clauses here, because petitioners' argument fails on more fundamental grounds. Congress preempted only "standard[s] relating to the control of emissions." It did not more expansively preempt any "law, rule, regulation, standard, or other provision having the force and effect of law relating to" the applicable subject matter—the preemption language at issue in *Morales*. *See id.* at 383 (internal quotation marks and citation omitted).

The text of section 209 underscores the importance of that distinction. Section 209(e), applicable only to certain "nonroad vehicles," preempts any state or local "standard *or other requirement* relating to the control of emissions" of those vehicles. 42 U.S.C. § 7543(e) (emphasis added). The omission of similar language in the parallel provision of section 209(a) establishes, at a minimum, that at least some state or local requirements "relating to the control of emissions" of the on-road vehicles at issue here are *not* "standards." Here, as in other settings, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *General Motors Corp.* v. *United States*, 496 U.S. 530, 538 (1990) (internal quotation marks and citations omitted).

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[3] *See, e.g., New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) ("If 'relate to' were taken to extend to the further stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for really, universally, relations stop nowhere.") (internal quotation marks and citation omitted); *California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997) (" 'an uncritical literalism' " in applying the "relates to" language "offer[s] scant utility in determining Congress' intent") (quoting *Travelers*, 514 U.S. at 656); *id.* at 335 (Scalia, J., concurring) ("applying the 'relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else").



Properly construed, the class of "standards" preempted under section 209(a) excludes the fleet purchase requirements at issue here. Claiming that "this case begins and ends with the text of Section 209(a)," petitioners selectively offer up the broadest dictionary definition of the word "standard." Pet. Br. 22, 24. But that term means dissimilar things in different settings, as a glance at any dictionary reveals. Indeed, the term has "varied usage[s] . . . throughout the Clean Air Act" itself, as the Justice Department notes, and the task of construing its meaning within section 209(a) is informed "primarily by context." U.S. Br. 15. The definition that most closely fits this context, and that comes nearest to specifying the field that Congress wished to federalize, is "carefully drawn specifications covering manufacturing material or equipment." *Webster's Third New Int'l Dictionary* 2223 (1993). In the automotive industry, an "emissions standard" is a "manufacturing specification" for motor vehicle emissions, *see, e.g., infra* pp. 20-21, and section 209(a) prevents states from adopting or enforcing such a "standard"—*i.e.*, subjecting manufacturers to a mandate that the vehicles they produce meet specified emissions levels, either individually or in the aggregate.

That is indeed the only way to make sense of the overall statutory structure. Because "[a]mbiguity is a creature not of definitional possibilities but of statutory context," *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994), it is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989); *see also Whitman* v. *American Trucking Ass'n*, 531 U.S. 457, 466 (2001) ("Words that can have more than one meaning are given content . . . by their surroundings[.]"). Here, section 209(a) is a companion provision to section 202 of the Clean Air Act, which establishes emissions "standards" for the motor vehicle industry by requiring that the vehicles or engines that manufacturers produce meet defined emissions criteria. *See* 42 U.S.C. § 7521. The only way to achieve symmetry and coherence between these two provisions, and fit them within a

"harmonious whole," *FTC* v. *Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959), is to construe the scope of the "standards" *preempted* by section 209(a) as coextensive with the type of "standards"—production mandates—*imposed* under section 202. Remarkably, however, both petitioners and the Justice Department—which acknowledges that "standard" has varied meanings under the Act (U.S. Br. 15)—largely ignore the most applicable use of the term, in section 202.

A brief review of that provision will help clarify the nature of these "standards." Congress enacted Title II of the Clean Air Act in 1965 to address the serious threat to the public health posed by emissions from motor vehicles. *See* H.R. Rep. No. 89-899, at 3 (1965) (Title II addresses "air pollution, especially emanating from motor vehicles, affecting thousands of communities in all parts of the country and imposing a serious threat to public health and national welfare"). Central to that effort was section 202, which authorized—for the first time—the enactment of federal "standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines." 42 U.S.C. § 7521(a)(1). These federal "standards" are directed at motor vehicle manufacturers, and require them to produce vehicles that meet certain numerical or technology-based emission levels.

In particular, section 202 consistently defines "standards" in terms of the quantity of pollutants that may be emitted from new motor vehicle tailpipes. To take just one example, regulations for heavy-duty trucks "shall contain standards which provide that [oxides of nitrogen] emissions may not exceed 4.0 grams per brake horsepower hour." 42 U.S.C. § 7521(a)(3)(B)(ii).[4] Such "standards" often apply by

[4] *See also id.* § 7521(a)(3)(A)(i) (providing that standards for certain pollutants shall "reflect the greatest degree of emission reduction achievable through the application of technology which the Administrator determines will be available"); *id.* § 7521(b)(1)(C) (discussing "numerical emission standards specified in subsections (a)(3)(B)(ii), (g), (h), and (i)"); *id.* § 7521(g)(1) (mandating "standards which provide that emissions from a percentage of each manufacturer's sales volume of [light-duty] vehicles and trucks shall comply with the levels specified in table G [expressed in grams per mile]"); *id.* § 7521(j)(1) (prescribing "standards which provide that emissions of carbon monoxide from a manufacturer's vehicles when operated at 20 degrees Fahrenheit may not exceed" specified "grams per mile").

The first regulations enacted under section 202 expressed "standards for exhaust emissions" in numerical terms. 31 Fed. Reg. 5170 (Mar. 30, 1966) (defining "standards for exhaust emissions" as "400 parts per million" for hydrocarbons and "2.3 percent by volume" for carbon monoxide).



"model year," which is defined as "the manufacturer's annual production period." *Id.* § 7521(b)(3)(A)(i).[5] In these and other cases, a manufacturer may not sell, introduce, or deliver a motor vehicle or motor vehicle engine that has not been certified as compliant with the applicable federal "standards." CAA § 203, 42 U.S.C. § 7522(a)(1).[6]

Following enactment of section 202, several states independently acted or proposed to exercise their traditional police powers to impose their own production mandates for tailpipe emissions.[7] This threatened a balkanized system of

[5] *See id.* § 7521(b)(1)(A) (requiring that "light-duty vehicles and engines manufactured during the model year 1980 . . . contain standards which provide that such emissions may not exceed 7.0 grams per vehicle mile"); *id.* § 7521(b)(1)(B) (mandating that "light-duty vehicles and engines manufactured during model years 1977 through 1980 shall contain standards that [oxides of nitrogen] emissions . . . may not exceed 2.0 grams per vehicle mile").

[6] *See also* CAA § 206, 42 U.S.C. § 7525(a)(1) ("The Administrator "shall test . . . any new motor vehicle . . . submitted by a manufacturer to determine whether such vehicle . . . conforms with the regulations prescribed under section [202]"); CAA § 202, 42 U.S.C. § 7521(b)(3) (entitling "manufacturer[s]" to seek a waiver from EPA of certain standards).

[7] *See Motor & Equip. Mfrs. Ass'n* v. *EPA*, 627 F.2d at 1108-09 & nn.25, 26; H.R. Rep. No. 89-899, at 5 (referencing "steps taken or proposed in many States to deal with motor vehicle pollution"); Currie, *supra*, 68 Mich. L. Rev. at 1089 ("Despite the 1965 federal standards, several states proceeded to consider or to enact legislation concerning vehicle emissions."); U.S. Dep't of Health, Education, and Welfare, *A Digest of State Air Pollution Laws* 101 (1967 ed.) (discussing 1967 Connecticut law authorizing agency to require "an effective air pollution control device" and "standards for such devices"); *id.* at 337 (discussing 1966 New Jersey law

state and federal emission "standards," under which motor vehicle manufacturers might have faced dozens of vastly divergent regulatory obligations in designing and producing vehicles. "The auto industry . . . was adamant that the nature of their manufacturing mechanism required a single national standard in order to eliminate undue economic strain on the industry." S. Rep. No. 90-403, at 33; *see also* H.R. Rep. No. 95-294, at 309-311 (1977) (section 209 responded to the concern that "vehicle manufacturers not be subject to 50 different sets of requirements relating to emission controls which would unduly burden interstate commerce").

The competing concerns of the states and the motor vehicle manufacturers form the backdrop to Congress's enactment of section 209(a) in 1967.

> [B]oth the history and text of the Act show that the . . . preemption section was made not to hamstring localities in their fight against air pollution but to prevent the burden on interstate commerce which would result if, instead of uniform standards, every state and locality were left free to impose different standards for exhaust emission control . . . for the manufacture and sale of new cars.

*Allway Taxi, Inc.* v. *City of New York*, 340 F. Supp. 1120, 1124 (S.D.N.Y.), *aff'd*, 468 F.2d 624 (2d Cir. 1972). The debate was "between states, which wanted to preserve their traditional role in regulating motor vehicles, and the manufacturers, which wanted to avoid the economic disruption latent in having to meet fifty-one separate sets of emissions control requirements." *Motor & Equip. Mfrs. Ass'n*, 627 F.2d at 1109; *cf. Motor Vehicle Mfrs. Ass'n of United States, Inc.* v. *New York State Dep't of Envt'l Conservation*, 79 F.3d 1298, 1301 (2d Cir. 1996) (noting "competing goals of Con-

authorizing agency to "establish[ ] standards and requirement for control of air contaminants from motor vehicles"); *id.* at 357 (discussing 1966 New York law authorizing agency to implement "an air contaminant emission control system . . . in accordance with standards promulgated by the Air Pollution Control Commission").



gress' clean air legislation, one of which is to protect manufacturers from regulatory chaos by preventing states from enacting multiple contradictory emissions standards, and the other of which is to safeguard public health by reducing the levels of toxic pollutants spouting from automobile tailpipes into the air we all must breathe"). Congress resolved that debate in section 209(a) by making exclusive the federal power under section 202 to impose "standards"—*i.e.*, production mandates—while otherwise leaving states and localities with authority sufficient to respond to particularized motor vehicle pollution problems.[8]

2. EPA itself has equated the meaning of "standard" in section 209(a) with its meaning in section 202 and has repeatedly explained that the term includes, as an essential element, a "production mandate"—a fact that may explain EPA's unorthodox and otherwise puzzling omission from the Justice Department's brief in support of petitioners. In 1999, for example, EPA stated that a section 209(a) "standard" is a "*requirement to produce* a certain number or percentage of vehicles ('production requirement') to meet a numerical emissions limitation" or "a numerical emission limitation and the number of vehicles that are subject to that limitation."[9] Twenty years earlier, in 1979, EPA similarly

[8] The legislative history of the preemption section reinforces that conclusion. The author of S. 780—which was enacted without any material change to what is now section 209(a)—explained that preemption extended only to "the *right to set standards* on automobile exhaust emissions." 113 Cong. Rec. 19173 (1967) (statement of Sen. Muskie) (emphasis added). That understanding of the "standards relating to the control of emissions" language was also shared by the relevant House and Senate committees. *See* S. Rep. No. 90-403, at 34 ("The committee has provided for Federal preemption of *the right to set standards* on new motor vehicles and new motor vehicle engines *only*.") (emphasis added); H.R. Rep. No. 90-728, at 36 (section 209(a) preempts "*the power [of states] to set standards on emissions* from new motor vehicles and engines") (emphasis added).

[9] *See* Letter from Gary S. Guzy (EPA) to the Honorable Thomas F. Reilly, Sept. 15, 1999 ("EPA Op. Letter"), at 8 (submitted in response to primary jurisdiction referral in *American Auto. Mfrs. Ass'n* v. *Massachu-*

explained—and the D.C. Circuit agreed—that "the word 'standards' connotes a numerical value setting the quantitative level of permitted emissions of pollutants by a new motor vehicle." *Motor & Equip. Mfrs. Ass'n*, 627 F.2d at 1111; *see also id.* at 1111-1112 (agreeing that "standards" are "quantitative levels of emissions," such as "a regulation limiting motor vehicle emissions of carbon monoxide to 3.4 grams per mile").

Although the Justice Department notes that the term can include more than "quantitative measures of tailpipe emissions *for particular vehicles*," that is only because (as the Department concedes) EPA and Congress have also exercised the federal standard-setting authority to "allow [some] manufacturers to choose what mix of vehicles to produce to attain fleetwide averages." U.S. Br. 15 n.3 (emphasis added); *see also id.* at 23 n.7. Either way, the term signifies a production mandate addressed to, and imposed on, manufacturers. The Fleet Rules impose nothing of the kind.

Similarly, the Justice Department contends that, under EPA's usage, "the term 'standard' includes both emissions-related criteria and the imposition of such criteria on an identified group of vehicles." U.S. Br. 23 n.7. But this simply confirms that, as applied to manufacturers, "criteria" and "the imposition of such criteria" are both necessary elements of a production mandate. On that issue, EPA can speak for itself: "the requirement to produce vehicles is in fact part of the emission standard," and "[t]his combination of an emissions limit and a requirement to produce vehicles meeting that limit is key to evaluating certain central issues in stan-

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*setts Dep't of Envt'l Protection*, 163 F.3d 74 (1st Cir. 1998)) (App. 70a). As discussed at note 15, *infra*, the First Circuit ultimately accepted EPA's interpretation and determined that Massachusetts's zero-emissions vehicle ("ZEV") sales-quota program—which included "numerical production requirements"—imposed a "standard" as used in section 209(a). *Association of Int'l Auto. Mfrs., Inc.* v. *Commissioner, Mass. Dep't of Envt'l Prot.*, 208 F.3d 1, 6-7 (1st Cir. 2000); *accord, American Auto. Mfrs. Ass'n* v. *Cahill*, 152 F.3d 196, 200 (2d Cir. 1998) (holding preempted similar New York ZEV program).



dard setting." EPA Op. Letter, at 9 (App. 70a-71a). In sum, EPA has consistently interpreted the state "standards" preempted by section 209(a) as coterminous with the federal production mandates imposed under section 202. *See id.* ("There is little reason to believe that Congress intended a substantially different interpretation of standard under section 209 than that under section 202."); *accord American Auto. Mfrs. Ass'n* v. *Commissioner*, 998 F. Supp. 10, 22 (D. Mass.), *aff'd*, 208 F.3d 1 (1st Cir. 1997) ("[I]t is unlikely that Congress intended the term "standards" to have a different meaning when referring to state standards as compared to federal standards.").

3. There is no basis for petitioners' contrary view that the scope of the term "standard" in section 209(a)'s preemption provision greatly *exceeds* the scope of the identical term in section 202. To begin with, that position contradicts the traditional "presumption against the pre-emption of state police power regulations," which prescribes "a narrow interpretation" of express preemption provisions in cases of doubt. *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks and citation omitted); *see also DeBuono* v. *NYSA-ILA Med. Clinical Servs. Fund*, 520 U.S. 806, 814 (1997). In this regard, petitioners blink reality when they claim (Br. 22) that there is "no 'tradition' of state regulation of motor vehicle emissions." As discussed, this Court has made clear that regulation of air pollution falls squarely within "even the most traditional concept of . . . the police power." *Huron*, 362 U.S. at 442. And a number of states had begun regulating, or had made plans to regulate, tailpipe emissions around the time the federal government imposed production mandates of its own. *See supra* p. 21 & note 7; *compare United States* v. *Locke*, 529 U.S. 89, 108 (2000) (addressing state laws "bear[ing] upon national and international maritime commerce," an area in which "Congress has legislated . . . from the earliest days of the Republic"). Indeed, even the Justice Department acknowledges

the states' "traditional role in regulating motor vehicles." U.S. Br. 19.[10]

In addition, petitioners' expansive definition of the pre-empted "standards" would create a mismatch not just between section 209(a) and section 202, but also between section 209(a) and section 209(b). Section 209(b) permits California to adopt "standards" of its own so long as they are "consistent with section [202]" and as "protective of public health and welfare as applicable Federal standards." 42 U.S.C. § 7543(b)(1); *see also* S. Rep. No. 90-403, at 33 (noting that California "standards on automobile emissions" may "be more stringent than national standards"). But comparing

[10] As petitioners note (Br. 22), Justice Douglas's opinion for the Court in *Washington* v. *General Motors Corp.*, 406 U.S. 109 (1972), contains the unelaborated statement that "Congress has largely pre-empted the field with regard to 'emissions from new motor vehicles.'" *Id.* at 114 (quoting a portion of the then-current version of section 209(a)). The Court's only holding in that case, however, was a decision not to exercise its original jurisdiction over an antitrust suit that various states had brought against the major auto makers. The statement in question was *dictum*, and indeed the Court's decision as a whole cuts *in favor of* the construction of section 209(a) adopted by the lower courts in this case.

The plaintiff states in *Washington* had alleged a conspiracy among the manufacturers "to restrain the development of motor vehicle air pollution control equipment" and had sought, among other things, "an injunction requiring the [manufacturers] to undertake 'an accelerated program of spending, research and development designed to produce a fully effective pollution control device or devices and/or pollution free engine at the earliest feasible date.'" 406 U.S. at 111-112. Put differently, the states sought to impose through the back door of antitrust litigation what section 209(a) keeps them from imposing through the front door of prescriptive regulation: *production mandates*, as to which Congress has indeed "pre-empted the field." *Id.* at 114. The Court nonetheless viewed the states' claims as sufficiently plausible on the merits that it decided to "remit the parties to the resolution of their controversies in the customary forum"—the district court—on the ground that those courts would be more capable of taking into account the "geophysical characteristics which define local and regional airsheds" and thus of establishing "[t]he nature of the remedy which may be necessary, *if a case for relief is made out.*" *Id.* at 114-15 (emphasis added). Here, of course, the District seeks no "relief" whatsoever against the manufacturers, because its regulations address only the purchasing decisions of fleet operators within the District's jurisdiction.



California's "standards" to "applicable Federal standards" can be a meaningful exercise only if the former fall within the same category of regulatory requirements as the latter. And it would make no sense to construe the term "standards" to mean one thing in section 209(b) but something different or broader in section 209(a). Indeed, "[t]he plain meaning of the statute indicates that Congress intended to make the waiver power [in section 209(b)] coextensive with the preemption provision [in section 209(a)]." *Motor & Equip. Mfrs. Ass'n*, 627 F.2d at 1107.

The Justice Department suggests that the section 209(b) waiver process makes it more palatable to construe section 209(a)'s preemption expansively, reasoning that section 209(b) ensures "a balance between the national interest in uniform federal requirements and the state interest in developing additional initiatives in response to local conditions." U.S. Br. 21. This logic is untenable for at least two reasons. First, the waiver process is unavailable to any of the 49 states *other than* California (except in the limited sense that, under section 177, they may adopt exactly the same standards that California adopts). As to those states, the section 209(b) process would neither preserve "additional initiatives in response to local conditions" nor, more generally, "balance" the unduly broad interpretation of section 209(a) that petitioners seek here on a nationwide basis.

Second, the relevant rule of construction is that, in cases of doubt, express preemption provisions should be given "a narrow interpretation" to accommodate a state's sovereign interest in exercising its traditional police powers. *Medtronic*, 518 U.S. at 485. That rule has particular force in the Clean Air Act context, where states and their subdivisions confront a zero-sum game: if overall reductions in air pollution that are mandated by federal law cannot come from the mobile sources that most aggravate the problem, they must

come from other sources.[11] Section 209(b) notwithstanding, the question here remains whether section 209(a) manifests a clear congressional intent to strip the states of their traditional authority to reduce air pollution through targeted fleet purchasing restrictions tailored to local clean air problems. If the answer to that question is no, as it is for the reasons discussed, it would be as inappropriate and intrusive as it is unnecessary to make California and the District jump through bureaucratic hoops in speculative pursuit of ultimate EPA approval of those restrictions. Where inessential to serve some clear and overriding federal objective, "the inevitable effect of any such law which forces any one of the States to entreat federal authorities in faraway places for approval of local laws before they can become effective is to create the impression that the State or States treated in this way are little more than conquered provinces." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 359-360 (1966) (Black, J., concurring in part and dissenting in part).

Finally, petitioners' position would give rise to yet another statutory anomaly, this one involving the relationship between the first sentence of section 209(a), on which petitioners rely, and the second sentence, which by its plain terms and by petitioners' admission (Pet. Br. 28) is inapplicable here. That second sentence prevents states from requiring a "certification, inspection, or any other approval relating to the control of emissions . . . as a condition precedent to the initial retail sale, titling (if any), or registration of

[11] The District, for example, must meet federal air-quality requirements for particulate matter by 2006, *see* CAA § 188, 42 U.S.C. § 7513(c)(2), (e); 68 Fed. Reg. 19316 (Apr. 18, 2003); and for ozone by 2010, *see* CAA § 181, 42 U.S.C. § 7511(a)(1); 65 Fed. Reg. 6091, 6100 (Feb. 8, 2000). Although so much of the ozone and particulate-matter pollution in the Los Angeles Basin—as elsewhere—derives from diesel exhaust, *see supra* p. 10, petitioners seek section 209(a) immunity from any state regulation "linked in some manner" (Pet. Br. 28) to motor vehicle emissions. This effort to hobble local efforts at targeted remediation would inefficiently off-load onto stationary or other mobile sources the burden of complying with federal air-quality requirements.



such motor vehicle." 42 U.S.C. § 7543(a). If petitioners' capacious definition of "standards" in the first sentence of section 209(a) were correct, the second sentence would be surplusage, because most or all of the prohibited state requirements would qualify as "standards," already preempted by the first sentence, by virtue of "referenc[ing]" the "characteristics of a motor vehicle's emissions." Pet. Br. 26. "It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks and citation omitted); *accord Duncan* v. *Walker*, 533 U.S. 167, 174 (2001). The proper way to honor that principle here is to equate the "standards" preempted by section 209(a) with the production mandates compelled by section 202.

## II. PETITIONERS' CONSTRUCTION OF SECTION 209(a) IS IRREMEDIABLY OVERINCLUSIVE.

Petitioners' definition of "standard" should be rejected not just because it sweeps much more broadly than the cognate meaning of that term in section 202 and the most applicable dictionary definition, departs from EPA's own pronouncements, and produces the interpretive anomalies discussed above, but also because—in practice—it would preempt far too much.

As noted, petitioners construe "standard" (Br. 28) to include any state or local law that contains an "express reference to emission characteristics or design criteria" or that is "linked in some other manner to control of motor vehicle emissions." But that definition encompasses a broad range of state-level clean-air initiatives that, by general consensus, Congress did *not* mean to preempt. The Justice Department states (Br. 17 n.4), for example, that section 209(a)'s preemption of "standards" does "not generally reach state voluntary or incentive programs that merely encourage vehicle manufacturers to sell, or consumers to buy, vehicles with particu-

lar emission characteristics." Those incentive programs—of which there have been many throughout the nation[12]—necessarily contain an "express reference to emissions characteristics or design criteria" (Pet. Br. 28). For example, a $500 rebate (or equivalent tax incentive) for the purchase of a hybrid car necessarily conditions consumer benefits on the purchase of vehicles with "particular emissions characteristics." And the creation of such benefits necessarily enhances the market for such vehicles and "encourage[s] vehicle manufacturers to sell" them (U.S. Br. 17 n.4). But, as the

[12] Examples of current or recent incentive programs include: Ariz. Rev. Stat. §§ 28-5801, 28-5805 (2003) (reduced license tax on alternative-fuel vehicles); Cal. Health & Safety Code §§ 44260-44265 (2002) (grant for purchase of zero-emission vehicles); *id.* §§ 44275-44299.1 (2003) (grant for projects within the state involving purchase of low-emission vehicles); *id.* §§ 44299.50-44299.55 (grant for projects within Sacramento involving purchase of low-emission vehicles); *id.* §§ 44299.75-44299.79 (grant for projects within San Joaquin Valley involving purchase of low-emission vehicles); *id.* §§ 44299.80-44299.85 (grant for projects in marine terminal areas of San Francisco and Los Angeles involving purchase of low-emission vehicles); Colo. Rev. Stat. § 39-26-114(22) (2003) (no state sales tax on low-emission vehicles); Conn. Gen. Stat. § 12-412(67)-12-412(68) (2003) (no state sales tax on alternative-fuel vehicles and conversion equipment); Ga. Code Ann. § 48-7-40.16 (2003) (tax credit of up to $5,000 for purchase of low-emission or zero-emission vehicles); 415 Ill. Comp. Stat. 120/30 (2003) (rebate of up to $4,000 for purchase of alternative-fuel vehicles); Kan. Stat. Ann. § 79-32,201 (2002) (tax credit for purchase of alternative-fuel vehicles); Md. Code Ann., Transp., § 13-815 (2003) (tax credit of up to $2,000 for purchase of low-emission vehicles); Me. Rev. Stat. Ann. tit. 36, § 1760(79) (2003) (tax exemption of portion of cost for clean-fuel vehicles); N.Y. Tax Law § 606(p) (2003) (tax credit of up to $10,000 for purchase of electric or clean-fuel vehicles); Or. Rev. Stat. § 316.116 (2001) (tax credit of up to $1,500 for purchase of alternative-fuel vehicles); R.I. Gen. Laws § 44-18-30(53) (2002) (reduced state sales tax for purchase of alternative-fuel vehicles); Utah Code Ann. § 59-10-127 (2003) (tax credit of up to $3,000 for purchase of alternative-fuel vehicles); Va. Code Ann. § 58.1-438.1 (2003) (tax credit for purchase of clean-fuel vehicles); W. Va. Code § 11-6D-5 (2003) (tax credit up to $50,000 for purchase of alternative-fuel vehicles). In addition, the Internal Revenue Code contains a range of substantial federal tax incentives for the purchase of clean vehicles. *See* 26 U.S.C. § 30 (tax credit of up to $4,000 for purchase of electric vehicles); *id.* § 179A (tax deduction of up to $50,000 for purchase of clean-fuel vehicles).



Justice Department acknowledges (*id.*), no one could seriously maintain that section 209(a) preempts such measures. Indeed, to reduce dependence on foreign oil, the Energy Policy Act of 1992 expressly authorizes the Department of Energy to make states eligible for "grants of Federal financial assistance" *if* they enlarge the market for alternative-fuel vehicles by (among other things) creating "exemption[s] from State sales tax or other State or local taxes or surcharges . . . with respect to alternative fueled vehicles, alternative fuels, or alternative fueling facilities[.]" 42 U.S.C. § 13235(a)(3)(A), (b)(1)(B) & (C). That provision would make no sense if Congress had preempted such incentive programs under section 209(a).[13]

The basic problem for petitioners is that their definition of "standard"—under which anything is preempted if it refers to or "is linked in some other manner to control of motor vehicle emissions" (Pet. Br. 28)—would swallow up these incentive programs along with the fleet purchasing require-

[13] The Justice Department obliquely suggests in a footnote (Br. 18 n.5) that sections 182(g)(4) and 249(f)(3) of the Clean Air Act, by addressing particular types of state incentive programs, indicate by negative implication that certain other types of incentive programs are impermissible. *See* 42 U.S.C. §§ 7511a(g)(4), 7589(f)(3). Any such argument—which, tellingly, petitioners have never made—is untenable. These two provisions specify ways in which states with non-attainment areas may *discharge* their federal *obligations* to provide an effective "state implementation plan." *See supra* pp. 4-5. That is why, for example, section 249(f)(3)(A) lists, as one such option, a state's imposition of a "registration fee" for non-clean-fuel vehicles "in the amount of *at least* 1 percent of the cost the vehicle." 42 U.S.C. § 7589(f)(3)(A) (emphasis added). It would be absurd to cite that provision as a basis for construing the Act to permit substantial penalties of this type for the purchase of non-clean-fuel vehicles but to preempt all tax exemptions and other benefits for the purchase of clean-fuel vehicles. And, as noted, it would be inconsistent with the Energy Policy Act, which assumes that states have broad authority to adopt the latter approach. Finally, section 249(f)(4) of the Act is also inapposite, because it does not apply within California and merely precludes non-California states that avail themselves of the section 249(f)(3) compliance option from imposing "any production or sales mandate." 42 U.S.C. § 7589(f)(4). As discussed, the Fleet Rules impose no such "mandate."

ments at issue here. This problem arises not from any slip of the pen in petitioners' opening brief, but from an unavoidable flaw at the heart of any argument for construing section 209(a) to preempt these Fleet Rules or any other state or local environmental program that might somehow affect the motor vehicle industry without imposing a production mandate. Petitioners *must* resort to their plainly overbroad definition of "standard," under which ordinary state incentive programs would be abruptly invalidated, because there is no valid limiting principle, faithful to the text or purposes of the Clean Air Act, that could *include* the Fleet Rules within the scope of preempted "standards" but nonetheless *exclude* the incentive programs—whose very purpose is to "encourage vehicle manufacturers to sell, or consumers to buy, vehicles with particular emission characteristics." U.S. Br. 17 n.4.

Although petitioners ignore this problem altogether, preferring to leave it for their reply brief, the Justice Department grasps for a solution in a footnote (Br. 17 n.4) and, in the process, reveals why no solution is available. The Department first suggests that the reason incentive programs do not fall within the scope of section 209(a) is that "they do not impose 'enforce[able]' requirements." *Id.* (quoting section 209(a)) (alteration in original). While difficult to discern, the Department's argument is apparently that, even if incentive programs qualified as "standards," states would not violate section 209(a) by adopting them, because those states would not be "enforc[ing]" these "standards" against anyone. But this line of analysis makes no sense. For one thing, section 209(a) forbids states either to "attempt to enforce" *or* to "adopt" any preempted "standard." If an incentive program otherwise qualified as a "standard relating to the control of emissions," section 209(a) would preempt any state or local decision to "adopt" such a program. For another thing, the text of section 209 as a whole precludes drawing the line under section 209(a) between emissions-related regulations that impose "requirements" and those that do not. As discussed above, section 209(a) preempts "any standard relating to the control of emissions" of on-road vehicles, whereas



the parallel provision of section 209(e) preempts "any standard or requirement relating to the control of emissions" of "nonroad" vehicles. The striking difference in language between these two companion provisions confirms that section 209(a) does *not* preempt at least some requirements "relating to the control of emissions." *See supra* Point I.1.

Quite apart from that textual consideration, there is also no logical basis consistent with the purposes of section 209(a) for distinguishing between "enforceable" and "non-enforceable" clean air policies so long as such policies do not impose production obligations on manufacturers. Although the Fleet Rules are compulsory as to *buyers* while incentive programs are not, the relevant perspective is that of the *manufacturers*. Section 209(a) was designed, after all, to protect manufacturers from any compulsory obligation to produce additional vehicle types beyond those mandated by the federal government and California,[14] not to guarantee

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[14] *See* S. Rep. No. 90-403, at 33 (section 209(a) responds to automakers' desire for "a single national standard in order to eliminate undue economic strain on the industry"); H.R. Rep. No. 95-294, at 309-311 (section 209(a) designed so that "vehicle manufacturers [would] not be subject to 50 different sets of requirements relating to emission controls"); *cf. 1990 Legislative History*, at 1022 ("[A] manufacturer could claim 'undue burden' if a state that adopted the California standard applied enforcement procedures that would require material[] changes in the manufacture of such vehicles, i.e., production of a third car."); *id.* at 950-951 (addressing "legitimate concern" of automakers "that different programs in different States could result in a requirement for a third or fourth or fifth car; that is, one that is different from either a California or a Federal vehicle").

By "prevent[ing] a chaotic situation from developing in interstate commerce in new motor vehicles," section 209(a) necessarily benefits both manufacturers and users. H.R. Rep. No. 90-728, at 21 (1967). But Congress's chosen method for avoiding that "chaotic situation" was to preempt divergent state production mandates. Thus, contrary to the suggestion of amici American Automotive Leasing Association et al. (Br. 22-23), the snippets of legislative history expressing concern for "the user" (S. Rep. No. 89-192, at 8 (1965)) refer only to the consumer benefits of limiting the sources of those mandates. Those snippets cannot plausibly be read to support any broader preemptive effect; indeed, section 209(d) permits the states to impose a wide range of divergent "use" restrictions that directly

consumers the right to buy the diesel fuel vehicles of their choice no matter where they live and no matter how severe the air pollution there. And the Fleet Rules do not compel any manufacturer to produce any particular vehicle. Indeed, for that matter, they even exempt *fleet owners* from any obligation to purchase clean fuel vehicles when such vehicles are commercially unavailable. *E.g.*, JA 30.[15]

At most, the Fleet Rules, like incentive programs, require motor vehicle manufacturers to contemplate a voluntary increase in the production of certain vehicles—specifically, the cleanest subset of vehicles within the category of fleet vehicles whose production CARB has required (with EPA's approval). For example, if no clean vehicle is currently manufactured for a particular category of fleet vehicles, one manufacturer might seek to gain a business advantage by producing the first such vehicles, because the purchasing requirements will have created a market for them. But any such incentive-based "race to the top" is hardly the type of burden that Congress sought to stave off in Section 209(a). Indeed, from a manufacturer's perspective, there is no reason in principle why a locality's fleet purchase requirements would be any more likely to spark such a race to the top, or otherwise affect manufacturing decisions, than an appropriately robust incentive program. And, as noted, no one could seriously contend that section 209(a) preempts such a program.

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affect users. *See* 42 U.S.C. § 7543(d) ("Nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles.").

[15] The Fleet Rules are thus markedly different from the production mandates determined to be "standards" in *Association of International Automobile Manufacturers*, *supra*, and *Cahill*, *supra*. Under the programs at issue in those cases, manufacturers were (i) required to design and produce ZEVs not otherwise mandated by EPA or CARB and (ii) required to sell ZEVs equal to two percent of their overall sales in New York and Massachusetts. *See Association of Int'l Auto. Mfrs.*, 208 F.3d at 3; *Cahill*, 152 F.3d at 199.



To paper over that problem, the Justice Department advocates (in a sentence in a footnote) a contrived and patently unworkable limitation on state incentive programs under section 209(a). On the one hand, the Department concedes that most "state voluntary or incentive programs" would be permissible because they "*merely encourage* vehicle manufacturers to sell, or consumers to buy, vehicles with particular emission characteristics." U.S. Br. 17 n.4 (emphasis added). On the other hand, plucking terms from Sherman Act jurisprudence, the Department adds that "an incentive program or related state initiative may well be preempted if it frustrates Section 209(a)'s purpose by acting as a substantial *barrier to the entry* of new motor vehicles into the marketplace." *Id.* 18 n.5 (emphasis added).

This proposed line between permissible "encouragement" and impermissible "barriers to entry" is untenable for several reasons. To begin with, the Justice Department altogether fails to (i) define "barrier to entry," (ii) explain why it would be appropriate to import that antitrust concept into a preemption analysis arising under the environmental laws, (iii) explain how incentive programs that erect such "barriers" should be distinguished from those that "merely encourage" the production and purchase of clean vehicles, or (iv) root any such distinction in the text of section 209(a). The Justice Department omits any discussion of these issues for good reason, because there is no sound legal doctrine that could be developed here. Even if the Department's proposed "line" were sensible as a matter of policy, which is doubtful, there would be no apparent reason why *courts*, rather than the political branches, should be the ones to draw it. Does a $2000 tax break for a particular vehicle erect a "barrier to the entry" of other "vehicles into the marketplace?" Presumably not[16]—but where, under the

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[16] Congress itself has included tax incentives of similar or greater magnitude throughout the Internal Revenue Code, with no apparent intent to impose "barriers to entry" of any kind. *See* 26 U.S.C. § 30 (tax credit of up to $4,000 for purchase of electric vehicles); *id.* § 179A (tax de-

Justice Department's approach, *should* that line be drawn? At what point does the effect on those unnamed "other" vehicles cross that line, and how should that effect be measured in the first place? Finally, and most important for present purposes, what basis would any court have to conclude that the fleet purchasing requirements at issue here fall into the "barrier to entry" category rather than the category for (permissible) state programs that "merely encourage vehicle manufacturers to sell ... vehicles with particular emission characteristics" (U.S. Br. 17 n.4)?

These are the sorts of fact-specific, policy-laden, *legislative* questions that Congress or EPA might be expected to address if they someday perceive a need to do so. These are *not* the sorts of questions that courts are institutionally equipped to address. The only line this Court need draw is the traditional one limiting the scope of section 209(a) to production mandates. The Fleet Rules impose no such mandate, nor do they impose *any* obligation upon manufacturers. They merely require fleet operators to choose the cleaner of those vehicles already available and certified for sale.

## III. Confining Section 209(a) To Production Mandates Establishes A Sensible And Easily Administered Rule Of Decision That Should Be Revisited, If At All, Only By The Political Branches.

In contrast to the overbreadth of petitioners' position and the indeterminacy of the Justice Department's alternative, restricting the preemptive scope of section 209(a) to production mandates provides a clear, manageable distinction between permissible and impermissible local environmental initiatives. It preserves the states' traditional flexibility to respond to particular local air-quality problems while protecting manufacturers from any compulsion to produce new motor vehicles based upon more than two numerical emission levels.

duction of up to $50,000 for purchase of clean-fuel vehicles); *id.* § 29 (tax credit for production of nonconventional fuel); *id.* § 40 (tax credit for production or use of alcohol-based fuel).



Petitioners, however, deride as "nonsensical" (Br. 25) any distinction between production mandates and purchase restrictions. "Every new vehicle transaction," they assert, "involves the purchase of the vehicle by the purchaser and the sale of the vehicle by the seller." *Id.* at 25-26. That is true but quite beside the point. Requiring a fleet owner to buy a particular vehicle imposes no legal obligation on any manufacturer to alter its plans to sell that vehicle, whereas a production mandate imposes precisely such an obligation. Although petitioners may dislike that pragmatic distinction, there is nothing "nonsensical" about it.

Indeed, it is *exactly* the same distinction that Congress and the EPA have drawn in connection with the federal government's own purchasing requirements under the "clean fuel fleet program"—a point the Justice Department altogether fails to mention. Section 246 of the Clean Air Act requires states with ozone or carbon monoxide "nonattainment" areas either (i) to adopt a set of fleet purchasing requirements prescribed by the federal government, 42 U.S.C. § 7586, or (ii) to create an alternative program that achieves the same ozone and carbon monoxide reductions, *see* 42 U.S.C. § 7511a(c)(4)(B). Any state that chooses the first option must require fleet owners to purchase a specified percentage of clean-fuel vehicles and to use clean alternative fuels in those vehicles. *See* 42 U.S.C. § 7586(b). Although the federal fleet program differs in certain respects from the Fleet Rules at issue here, the underlying structure is the same. Both require certain fleet operators to purchase clean-fuel or low-emission vehicles: the Fleet Rules reference certain CARB standards, whereas the federal fleet program references standards set forth in section 243, 42 U.S.C. § 7583. But neither fleet purchasing program itself regulates or imposes any production mandate on motor vehicle manufacturers. *See* 58 Fed. Reg. 11888, 11898 (Mar. 1, 1993) (federal fleet rules are "largely voluntary" to the "auto

industry" because "[m]anufacturers will seek [program] qualification only if demand for such vehicles is sufficient").

This distinction between purchasing requirements and production mandates—the same distinction petitioners call "nonsensical"—is the explicit premise of section 246 and its accompanying regulatory scheme. As EPA explains, "in adopting the [federal fleets program], Congress made a clear choice between two alternatives: requiring auto manufacturers *to produce* and sell [clean-fuel vehicles], or creating a market for [clean-fuel vehicles] . . . by requiring fleet operators *to purchase* such vehicles[.]" 63 Fed. Reg. at 20105 (emphasis added) (App. 49a). Congress, EPA observed, deliberately chose the latter option instead of the former. Senator Carl Levin of Michigan, who ably represents Detroit automakers among his other constituents, likewise invoked the logical and practical significance of this distinction by assuring the public that the federal fleet program is "carefully designed to avoid the mandated production and sales that we all agreed to avoid." *1990 Legislative History*, at 7209. Instead, he explained, "[t]he fleets program . . . requires the purchase of low-emission vehicles by . . . operators of private, centrally fueled and centrally maintained fleets." *Id.* Senator Levin acknowledged that these compulsory purchases "will create a *substantial demand* for such cars, giving motor vehicle manufacturers a *real incentive to bring them into production.*" *Id.* (emphasis added). "However," he emphasized, "the provision does not contain any production or sales mandate, direct or indirect," *id.*—and is thus appropriate as a matter of federal policy.

In short, Congress and EPA have both embraced the very distinction that petitioners criticize as unworkable and implausible. Petitioners suggest (Br. 26) that, in an extreme and highly unlikely scenario, the widespread adoption of identical purchasing rules by states or localities could amount in practical effect to a production mandate for particular manufacturers. But that logic did not impress Congress, which created federal fleet purchasing requirements with potentially very broad application—but which nonetheless concluded that, despite their scope, such requirements are importantly different from production mandates of the sort imposed by section 202 and preempted by section 209(a). The same holds particularly true in the case of the District's Fleet Rules, which by their terms do not apply if the designated vehicle is not commercially available. *E.g.*, JA 30. And, of course, the political branches remain free to draw whatever other line they deem appropriate as circumstances warrant.



## IV. Confining Section 209(a) To Production Mandates Is Consistent With Other Provisions Of The Clean Air Act.

Petitioners argue that limiting the preemptive scope of section 209(a) would be inconsistent with a variety of other provisions in the Clean Air Act. In each case, petitioners are wrong.

First, seeking to turn section 246 to their own advantage, petitioners suggest, without saying so explicitly, that Congress's establishment of a federal fleet program somehow occupies the field of fleet vehicle regulations. *See* Pet. Br. 32. As an initial matter, petitioners have waived any reliance on section 246 as a basis for preemption, because they raised no such argument either below (Pet. App. 2a n.1) or in their petition for certiorari (Pet. i). *See Glover* v. *United States*, 531 U.S. 198, 205 (2001) ("In the ordinary course, we do not decide questions neither raised nor resolved below."); S. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). And the argument is without merit in any event. Section 246 does not purport to authorize the states to enact otherwise-preempted fleet purchasing rules. Instead, as noted, it *requires* certain "nonattainment" states to add such rules to their "state implementation plans" unless they obtain EPA approval to pursue an alternative approach as set forth in section 182, 42 U.S.C. § 7511a(c)(4)(B).

If anything, section 246 presumes that the states retain full authority to implement fleet purchasing requirements on

their own initiative: section 246 does not use the term "standard" in describing fleet purchasing requirements, and it does not exempt such requirements from section 209(a) through a "notwithstanding" clause, as one might have expected if they were otherwise preempted. Just as important, section 246 is conspicuously omitted from the statutory list of provisions deemed by section 116 of the Act to assert exclusive federal authority over a particular subject area. *See* 42 U.S.C. § 7416 (affirming retained state authority except as provided in enumerated federal provisions); *see generally Motor & Equip. Mfrs. Ass'n*, 627 F.2d at 1107 n.20 (noting automobile industry's "difficult burden" of showing preemption under section 207 of the Clean Air Act where it is "not among" section 116's list of provisions that "Congress intended to reserve for exclusive federal regulation"). For that reason alone, section 116 squarely precludes any preemptive interpretation of section 246.

Petitioners' focus on the substantive distinctions between the federal fleet program and the Fleet Rules (*see* Br. 43-44) is beside the point, because section 246 does not prescribe *particular* federal requirements with which states must comply. Covered states are instead given the flexibility to forgo the federal fleet program in whole or in part and to adopt an alternative program of their own, so long as they persuade EPA that doing so "will achieve [equivalent] long-term reductions" in air pollution. CAA § 182, 42 U.S.C. § 7511a(c)(4)(B).[17] The considerable discretion left to the

[17] In adopting regulations under section 246, EPA expected there to "be some overlap" between the "clean fuel fleet program" and the "number of other programs being implemented or considered at national, state, or local levels, which involve the introduction of clean fuel vehicles in fleets." 56 Fed. Reg. 50196, 50199 (Oct. 3, 1991); *cf.* H.R. Rep. No. 101-490, at 177 (1990) (noting that, along with section 246, "California would be proceeding along its own path, perceived at this time as mandating similar fleet requirements plus diffusion of alternative-fueled passenger cars into the general auto market"). EPA "define[d] certain terms and resolve[d] certain issues by regulation" in order to "reduce ambiguity and increase the effectiveness of the Clean Fuel Fleet Program," but reiterated its "general view" that "program implementation be left to the states." 58 Fed. Reg. 32474, 32476 (June 10, 1993).



states belies any claim that the Clean Air Act reflects Congress's view of the only "right" way to design fleet purchasing requirements. And other federal statutes confirm the same conclusion: for example, the Energy Policy Act of 1992 gives the Department of Energy, rather than EPA, broad discretion to impose fleet purchasing requirements of its own design on a nationwide basis to reduce dependence on foreign oil. *See* 42 U.S.C. § 13257.[18] In sum, even if petitioners had preserved the issue, they would not come close to satisfying the strict standard for implied conflict or field preemption under section 246, particularly given the express reservation of state authority under section 116. *See, e.g.*, *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (courts must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress"); *Medtronic*, 518 U.S. at 485; *see generally English* v. *General Elec. Co.*, 496 U.S. 72, 78-79 (1990) (discussing conflict and field preemption).

Petitioners next rely on section 177, which was enacted after section 209(a) and which permits other states to adopt California's "standards"—*i.e.*, its EPA-approved production mandates—as their own. *See* 42 U.S.C. § 7507. Under section 177, opt-in states must ensure that their "standards" are "identical" to those of California. *See* 42 U.S.C. § 7507(1). This "identicality" requirement was intended to prevent those states from compelling manufacturers to produce a "third vehicle" in addition to those required by the national and California standards. *See Cahill*, 152 F.3d at 201 (section 177's "identicality" requirement avoids the burden on manufacturers of having to "comply with more than two—

[18] There are significant differences between the fleet programs established in the Energy Policy Act and the Clean Air Act. One notable example is that the former does not include any form of diesel in its definition of "alternate fuel." *Compare* 42 U.S.C. § 13211(2), *with* CAA § 241, 42 U.S.C. § 7581(2).

perhaps several—sets of emissions regulations"); H.R. Rep. No. 95-294, at 309-311 (1977) (section 177 "should not place an undue burden on vehicle manufacturers who will be required, in any event, to produce vehicles meeting the California standards for sale in California"); *1990 Legislative History*, at 1787 ("States exercising this section 177 option may not, in such adoption and enforcement, create a 'third vehicle' that is not a California vehicle or a 49-state Federal vehicle, because of the burden it would place on the motor vehicle manufacturers."). To that end, section 177 also provides that nothing in Title II of the Clean Air Act authorizes opt-in states to "prohibit or limit, directly or indirectly, the manufacture or sale of a new motor vehicle." 42 U.S.C. § 7507.

Petitioners rely on this provision (Br. 30-31) as indirect evidence of preemption under section 209(a), but that reliance is misplaced. As an initial matter, the District is not an "opt in" state (or a political subdivision thereof), and section 177 thus does not apply to it. And, despite petitioners' contrary suggestion (*id.*), the relevant case law strongly indicates that the Fleet Rules would not violate section 177 even if some state or locality outside of California had adopted them. *See Motor Vehicle Mfrs. Ass'n of United States, Inc.* v. *New York State Dep't of Envtl. Conservation*, 17 F.3d 521, 536 (2d Cir. 1994) (rejecting section 177 preemption challenge to New York's much more intrusive ZEV sales quota program on the ground that, although "the ZEV quota may affect the sale of non-ZEV California-certified cars" because "the market for cars is not unlimited," " 'affect' is not the key word of § 177, the catchword is 'limit.' "); *cf. 1990 Legislative History*, at 7209 (statement of Sen. Levin) (federal fleet program "does not contain any production or sales mandate, direct or indirect," even though it undoubtedly "will create a substantial demand for such cars, giving motor vehicle manufacturers a real incentive to bring them into production"). Finally, even if section 177 *would* preempt such rules if adopted by a state other than California, there is nothing remotely anomalous as a policy matter about exempting California and its political subdivisions from the preemptive



force of that provision, given California's long-established claim as a state with unique air pollution problems and its status as the pioneer of air quality initiatives.

Finally, petitioners invoke section 209(d), which declares that, apart from the regulations expressly preempted, nothing in Part A of Title II precludes states and localities from exercising "the right otherwise to control, regulate, or restrict the use, operation or movement of registered or licensed motor vehicles." 42 U.S.C. § 7543(d). Petitioners' reliance on this provision is also misplaced. To begin with, these Fleet Rules are, in fact, a "restrict[ion]" on "the use" of particular vehicles—specifically, on their use within *fleets* defined by a certain threshold number of vehicles. Nothing in the Rules prevents any vehicle from being registered in California. Thus, although the issue was not litigated below, section 209(d) affirmatively preserves these requirements from preemption, for nothing in the Clean Air Act " 'preclude[s] a locality from setting its own standards for the licensing of vehicles for commercial use within that locality. Such regulations would cause only minimal interference with interstate commerce, since they would be directed primarily to intrastate activities and the burden of compliance would be on individual owners and not on manufacturers or distributors.' " *Engine Mfrs. Ass'n* v. *EPA*, 88 F.3d 1075, 1083 (D.C. Cir. 1996) (quoting *Allway Taxi*, 340 F. Supp. at 1124) (dicta).

But even if section 209(d) did not itself preserve the Fleet Rules from preemption, that could only be because it is irrelevant to the section 209(a) inquiry altogether. Although petitioners would read section 209(d) as an exhaustive compendium of the states' preserved powers (Pet. Br. 29), it is nothing of the sort. Section 209(d) is not an exception to section 209(a) itself; it is a general savings clause for Part A of Title II as a whole, and it relates only to the specific subject matter of "use" restrictions. It has no bearing on other subjects of regulation under the Clean Air Act, and it cannot justify an expansive construction of express preemption clauses that address different issues, such as motor vehicle

"standards." *Cf. Motor & Equip. Mfrs. Ass'n*, 627 F.2d at 1107 n.19 ("Subsection (d) makes clear that the preemption provision is not intended to preempt state regulation other than as expressed in subsection (a).").

## CONCLUSION

The judgment of the courts below should be affirmed.

Respectfully submitted.

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NOVEMBER 2003

# APPENDIX

# STATUTORY PROVISIONS

**[CAA § 101] 42 U.S.C. § 7401. Congressional findings and declaration of purpose**

**(a) Findings**

The Congress finds—

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

**(b) Declaration**

The purposes of this subchapter are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the

development and execution of their air pollution prevention and control programs; and

**(4)** to encourage and assist the development and operation of regional air pollution prevention and control programs.

**(c) Pollution prevention**

A primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention.



**[CAA § 116] 42 U.S.C § 7416. Retention of State authority**

Except as otherwise provided in sections 1857c-10(c), (e), and (f) (as in effect before August 7, 1977), 7543, 7545(c)(4), and 7573 of this title (preempting certain State regulation of moving sources) nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

**[CAA § 177] 42 U.S.C. § 7507. New motor vehicle emission standards in nonattainment areas**

Notwithstanding section 7543(a) of this title, any State which has plan provisions approved under this part may adopt and enforce for any model year standards relating to control of emissions from new motor vehicles or new motor vehicle engines and take such other actions as are referred to in section 7543(a) of this title respecting such vehicles if—

**(1)** such standards are identical to the California standards for which a waiver has been granted for such model year, and

**(2)** California and such State adopt such standards at least two years before commencement of such model year (as determined by regulations of the Administrator).

Nothing in this section or in subchapter II of this chapter shall be construed as authorizing any such State to prohibit or limit, directly or indirectly, the manufacture or sale of a new motor vehicle or motor vehicle engine that is certified in California as meeting California standards, or to take any action of any kind to create, or have the effect of creating, a motor vehicle or motor vehicle engine different than a motor vehicle or engine certified in California under California standards (a "third vehicle") or otherwise create such a "third vehicle".



**[CAA § 202] 42 U.S.C. § 7521. Emission standards for new motor vehicles or new motor vehicle engines**

**(a) Authority of Administrator to prescribe by regulation**

Except as otherwise provided in subsection (b) of this section—

**(1)** The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. Such standards shall be applicable to such vehicles and engines for their useful life (as determined under subsection (d) of this section, relating to useful life of vehicles for purposes of certification), whether such vehicles and engines are designed as complete systems or incorporate devices to prevent or control such pollution.

**(2)** Any regulation prescribed under paragraph (1) of this subsection (and any revision thereof) shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.

**(3)(A) In general**

**(i)** Unless the standard is changed as provided in subparagraph (B), regulations under paragraph (1) of this subsection applicable to emissions of hydrocarbons, carbon monoxide, oxides of nitrogen, and particulate matter from classes or categories of heavy-duty vehicles or engines manufactured during or after model year 1983 shall contain standards which reflect the greatest degree of emission reduction achievable through the application of technology which the Administrator determines will be available for the model year to which such standards apply, giving appropriate consideration to cost, energy, and safety factors associated with the application of such technology.

(ii) In establishing classes or categories of vehicles or engines for purposes of regulations under this paragraph, the Administrator may base such classes or categories on gross vehicle weight, horsepower, type of fuel used, or other appropriate factors.

**(B) Revised standards for heavy duty trucks**

(i) On the basis of information available to the Administrator concerning the effects of air pollutants emitted from heavy-duty vehicles or engines and from other sources of mobile source related pollutants on the public health and welfare, and taking costs into account, the Administrator may promulgate regulations under paragraph (1) of this subsection revising any standard promulgated under, or before the date of, the enactment of the Clean Air Act Amendments of 1990 (or previously revised under this subparagraph) and applicable to classes or categories of heavy-duty vehicles or engines.

(ii) Effective for the model year 1998 and thereafter, the regulations under paragraph (1) of this subsection applicable to emissions of oxides of nitrogen (NOx) from gasoline and diesel-fueled heavy duty trucks shall contain standards which provide that such emissions may not exceed 4.0 grams per brake horsepower hour (gbh).

**(C) Lead time and stability**

Any standard promulgated or revised under this paragraph and applicable to classes or categories of heavy-duty vehicles or engines shall apply for a period of no less than 3 model years beginning no earlier than the model year commencing 4 years after such revised standard is promulgated.

**(D) Rebuilding practices**

The Administrator shall study the practice of rebuilding heavy-duty engines and the impact rebuilding has on engine emissions. On the basis of that study and other information available to the Administrator, the Administrator may prescribe requirements to control rebuilding practices, including standards applicable to emissions from any rebuilt heavy-duty engines (whether or



not the engine is past its statutory useful life), which in the Administrator's judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare taking costs into account. Any regulation shall take effect after a period the Administrator finds necessary to permit the development and application of the requisite control measures, giving appropriate consideration to the cost of compliance within the period and energy and safety factors.

**(E) Motorcycles**

For purposes of this paragraph, motorcycles and motorcycle engines shall be treated in the same manner as heavy-duty vehicles and engines (except as otherwise permitted under section 7525(f)(1) of this title) unless the Administrator promulgates a rule reclassifying motorcycles as light-duty vehicles within the meaning of this section or unless the Administrator promulgates regulations under subsection (a) of this section applying standards applicable to the emission of air pollutants from motorcycles as a separate class or category. In any case in which such standards are promulgated for such emissions from motorcycles as a separate class or category, the Administrator, in promulgating such standards, shall consider the need to achieve equivalency of emission reductions between motorcycles and other motor vehicles to the maximum extent practicable.

**(4)(A)** Effective with respect to vehicles and engines manufactured after model year 1978, no emission control device, system, or element of design shall be used in a new motor vehicle or new motor vehicle engine for purposes of complying with requirements prescribed under this subchapter if such device, system, or element of design will cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation or function.

**(B)** In determining whether an unreasonable risk exists under subparagraph (A), the Administrator shall consider, among other factors, (i) whether and to what extent the use of any device, system, or element of design

causes, increases, reduces, or eliminates emissions of any unregulated pollutants; (ii) available methods for reducing or eliminating any risk to public health, welfare, or safety which may be associated with the use of such device, system, or element of design, and (iii) the availability of other devices, systems, or elements of design which may be used to conform to requirements prescribed under this subchapter without causing or contributing to such unreasonable risk. The Administrator shall include in the consideration required by this paragraph all relevant information developed pursuant to section 7548 of this title.

**(5)(A)** If the Administrator promulgates final regulations which define the degree of control required and the test procedures by which compliance could be determined for gasoline vapor recovery of uncontrolled emissions from the fueling of motor vehicles, the Administrator shall, after consultation with the Secretary of Transportation with respect to motor vehicle safety, prescribe, by regulation, fill pipe standards for new motor vehicles in order to insure effective connection between such fill pipe and any vapor recovery system which the Administrator determines may be required to comply with such vapor recovery regulations. In promulgating such standards the Administrator shall take into consideration limits on fill pipe diameter, minimum design criteria for nozzle retainer lips, limits on the location of the unleaded fuel restrictors, a minimum access zone surrounding a fill pipe, a minimum pipe or nozzle insertion angle, and such other factors as he deems pertinent.

**(B)** Regulations prescribing standards under subparagraph (A) shall not become effective until the introduction of the model year for which it would be feasible to implement such standards, taking into consideration the restraints of an adequate leadtime for design and production.

**(C)** Nothing in subparagraph (A) shall (i) prevent the Administrator from specifying different nozzle and fill neck sizes for gasoline with additives and gasoline without additives or (ii) permit the Administrator to require a



specific location, configuration, modeling, or styling of the motor vehicle body with respect to the fuel tank fill neck or fill nozzle clearance envelope.

**(D)** For the purpose of this paragraph, the term "fill pipe" shall include the fuel tank fill pipe, fill neck, fill inlet, and closure.

**(6) Onboard vapor recovery**

Within 1 year after November 15, 1990, the Administrator shall, after consultation with the Secretary of Transportation regarding the safety of vehicle-based ("onboard") systems for the control of vehicle refueling emissions, promulgate standards under this section requiring that new light- duty vehicles manufactured beginning in the fourth model year after the model year in which the standards are promulgated and thereafter shall be equipped with such systems. The standards required under this paragraph shall apply to a percentage of each manufacturer's fleet of new light-duty vehicles beginning with the fourth model year after the model year in which the standards are promulgated. The percentage shall be as specified in the following table:

IMPLEMENTATION SCHEDULE FOR ONBOARD VAPOR RECOVERY REQUIREMENTS

| Model year commencing after standards promulgated | Percentage * |
|---|---|
| Fourth | 40 |
| Fifth | 80 |
| After Fifth | 100 |

*Percentages in the table refer to a percentage of the manufacturer's sales

The standards shall require that such systems provide a minimum evaporative emission capture efficiency of 95 percent. The requirements of section 7511a(b)(3) of this title (relating to stage II gasoline vapor recovery) for areas classified under section 7511 of this title as moderate for ozone shall not apply after promulgation of such standards and the Administrator may, by rule, revise or waive the application of the requirements of such section 7511a(b)(3) of

this title for areas classified under section 7511 of this title as Serious, Severe, or Extreme for ozone, as appropriate, after such time as the Administrator determines that onboard emissions control systems required under this paragraph are in widespread use throughout the motor vehicle fleet.

**(b) Emissions of carbon monoxide, hydrocarbons, and oxides of nitrogen; annual report to Congress; waiver of emission standards; research objectives**

**(1)(A)** The regulations under subsection (a) of this section applicable to emissions of carbon monoxide and hydrocarbons from light-duty vehicles and engines manufactured during model years 1977 through 1979 shall contain standards which provide that such emissions from such vehicles and engines may not exceed 1.5 grams per vehicle mile of hydrocarbons and 15.0 grams per vehicle mile of carbon monoxide. The regulations under subsection (a) of this section applicable to emissions of carbon monoxide from light-duty vehicles and engines manufactured during the model year 1980 shall contain standards which provide that such emissions may not exceed 7.0 grams per vehicle mile. The regulations under subsection (a) of this section applicable to emissions of hydrocarbons from light-duty vehicles and engines manufactured during or after model year 1980 shall contain standards which require a reduction of at least 90 percent from emissions of such pollutant allowable under the standards under this section applicable to light-duty vehicles and engines manufactured in model year 1970. Unless waived as provided in paragraph (5), regulations under subsection (a) of this section applicable to emissions of carbon monoxide from light-duty vehicles and engines manufactured during or after the model year 1981 shall contain standards which require a reduction of at least 90 percent from emissions of such pollutant allowable under the standards under this section applicable to light-duty vehicles and engines manufactured in model year 1970.

**(B)** The regulations under subsection (a) of this section applicable to emissions of oxides of nitrogen from light-duty vehicles and engines manufactured during model years 1977



through 1980 shall contain standards which provide that such emissions from such vehicles and engines may not exceed 2.0 grams per vehicle mile. The regulations under subsection (a) of this section applicable to emissions of oxides of nitrogen from light-duty vehicles and engines manufactured during the model year 1981 and thereafter shall contain standards which provide that such emissions from such vehicles and engines may not exceed 1.0 gram per vehicle mile. The Administrator shall prescribe standards in lieu of those required by the preceding sentence, which provide that emissions of oxides of nitrogen may not exceed 2.0 grams per vehicle mile for any light-duty vehicle manufactured during model years 1981 and 1982 by any manufacturer whose production, by corporate identity, for calendar year 1976 was less than three hundred thousand light-duty motor vehicles worldwide if the Administrator determines that—

**(i)** the ability of such manufacturer to meet emission standards in the 1975 and subsequent model years was, and is, primarily dependent upon technology developed by other manufacturers and purchased from such manufacturers; and

**(ii)** such manufacturer lacks the financial resources and technological ability to develop such technology.

**(C)** The Administrator may promulgate regulations under subsection (a)(1) of this section revising any standard prescribed or previously revised under this subsection, as needed to protect public health or welfare, taking costs, energy, and safety into account. Any revised standard shall require a reduction of emissions from the standard that was previously applicable. Any such revision under this subchapter may provide for a phase-in of the standard. It is the intent of Congress that the numerical emission standards specified in subsections (a)(3)(B)(ii), (g), (h), and (i) of this section shall not be modified by the Administrator after November 15, 1990, for any model year before the model year 2004.

(2) Emission standards under paragraph (1), and measurement techniques on which such standards are based (if not promulgated prior to November 15, 1990), shall be promulgated by regulation within 180 days after November 15, 1990.

(3) For purposes of this part—

(A)(i) The term "model year" with reference to any specific calendar year means the manufacturer's annual production period (as determined by the Administrator) which includes January 1 of such calendar year. If the manufacturer has no annual production period, the term "model year" shall mean the calendar year.

(ii) For the purpose of assuring that vehicles and engines manufactured before the beginning of a model year were not manufactured for purposes of circumventing the effective date of a standard required to be prescribed by subsection (b) of this section, the Administrator may prescribe regulations defining "model year" otherwise than as provided in clause (i).

(B) Repealed. Pub.L. 101-549, Title II, § 230(1), Nov. 15, 1990, 104 Stat. 2529.

(C) The term "heavy duty vehicle" means a truck, bus, or other vehicle manufactured primarily for use on the public streets, roads, and highways (not including any vehicle operated exclusively on a rail or rails) which has a gross vehicle weight (as determined under regulations promulgated by the Administrator) in excess of six thousand pounds. Such term includes any such vehicle which has special features enabling off-street or off-highway operation and use.

(3) [FN1] Upon the petition of any manufacturer, the Administrator, after notice and opportunity for public hearing, may waive the standard required under subparagraph (B) of paragraph (1) to not exceed 1.5 grams of oxides of nitrogen per vehicle mile for any class or category of light-duty vehicles or engines manufactured by such manufacturer during any period of up to four model years beginning after the model year 1980 if the manufacturer



demonstrates that such waiver is necessary to permit the use of an innovative power train technology, or innovative emission control device or system, in such class or category of vehicles or engines and that such technology or system was not utilized by more than 1 percent of the light-duty vehicles sold in the United States in the 1975 model year. Such waiver may be granted only if the Administrator determines—

(A) that such waiver would not endanger public health,

(B) that there is a substantial likelihood that the vehicles or engines will be able to comply with the applicable standard under this section at the expiration of the waiver, and

(C) that the technology or system has a potential for long-term air quality benefit and has the potential to meet or exceed the average fuel economy standard applicable under the Energy Policy and Conservation Act [42 U.S.C.A. § 6201 et seq.] upon the expiration of the waiver.

No waiver under this subparagraph [FN2] granted to any manufacturer shall apply to more than 5 percent of such manufacturer's production or more than fifty thousand vehicles or engines, whichever is greater.

**(c) Feasibility study and investigation by National Academy of Sciences; reports to Administrator and Congress; availability of information**

(1) The Administrator shall undertake to enter into appropriate arrangements with the National Academy of Sciences to conduct a comprehensive study and investigation of the technological feasibility of meeting the emissions standards required to be prescribed by **the Administrator by subsection (b) of this section.**

(2) Of the funds authorized to be appropriated to the Administrator by this chapter, such amounts as are required shall be available to carry out the study and investigation authorized by paragraph (1) of this subsection.

(3) In entering into any arrangement with the National Academy of Sciences for conducting the study and investigation authorized by paragraph (1) of this subsection, the Administrator shall request the National Academy of Sciences to submit semiannual reports on the progress of its study and investigation to the Administrator and the Congress, beginning not later than July 1, 1971, and continuing until such study and investigation is completed.

(4) The Administrator shall furnish to such Academy at its request any information which the Academy deems necessary for the purpose of conducting the investigation and study authorized by paragraph (1) of this subsection. For the purpose of furnishing such information, the Administrator may use any authority he has under this chapter (A) to obtain information from any person, and (B) to require such person to conduct such tests, keep such records, and make such reports respecting research or other activities conducted by such person as may be reasonably necessary to carry out this subsection.

**(d) Useful life of vehicles**

The Administrator shall prescribe regulations under which the useful life of vehicles and engines shall be determined for purposes of subsection (a)(1) of this section and section 7541 of this title. Such regulations shall provide that except where a different useful life period is specified in this subchapter useful life shall—

(1) in the case of light duty vehicles and light duty vehicle engines and light-duty trucks up to 3,750 lbs. LVW and up to 6,000 lbs. GVWR, be a period of use of five years or fifty thousand miles (or the equivalent), whichever first occurs, except that in the case of any requirement of this section which first becomes applicable after November 15, 1990, where the useful life period is not otherwise specified for such vehicles and engines, the period shall be 10 years or 100,000 miles (or the equivalent), whichever first occurs, with testing for purposes of in-use compliance under section 7541 of this title up to (but not beyond) 7 years or 75,000 miles (or the equivalent), whichever first occurs;



(2) in the case of any other motor vehicle or motor vehicle engine (other than motorcycles or motorcycle engines), be a period of use set forth in paragraph (1) unless the Administrator determines that a period of use of greater duration or mileage is appropriate; and

(3) in the case of any motorcycle or motorcycle engine, be a period of use the Administrator shall determine.

**(e) New power sources or propulsion systems**

In the event of a new power source or propulsion system for new motor vehicles or new motor vehicle engines is submitted for certification pursuant to section 7525(a) of this title, the Administrator may postpone certification until he has prescribed standards for any air pollutants emitted by such vehicle or engine which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger the public health or welfare but for which standards have not been prescribed under subsection (a) of this section.

**(f) [FN3] High altitude regulations**

(1) The high altitude regulation in effect with respect to model year 1977 motor vehicles shall not apply to the manufacture, distribution, or sale of 1978 and later model year motor vehicles. Any future regulation affecting the sale or distribution of motor vehicles or engines manufactured before the model year 1984 in high altitude areas of the country shall take effect no earlier than model year 1981.

(2) Any such future regulation applicable to high altitude vehicles or engines shall not require a percentage of reduction in the emissions of such vehicles which is greater than the required percentage of reduction in emissions from motor vehicles as set forth in subsection (b) of this section. This percentage reduction shall be determined by comparing any proposed high altitude emission standards to high altitude emissions from vehicles manufactured during model year 1970. In no event shall regulations applicable to high altitude vehicles manufactured before the model year 1984 establish a numerical standard which is more stringent than

that applicable to vehicles certified under non-high altitude conditions.

(3) Section 7607(d) of this title shall apply to any high altitude regulation referred to in paragraph (2) and before promulgating any such regulation, the Administrator shall consider and make a finding with respect to—

(A) the economic impact upon consumers, individual high altitude dealers, and the automobile industry of any such regulation, including the economic impact which was experienced as a result of the regulation imposed during model year 1977 with respect to high altitude certification requirements;

(B) the present and future availability of emission control technology capable of meeting the applicable vehicle and engine emission requirements without reducing model availability; and

(C) the likelihood that the adoption of such a high altitude regulation will result in any significant improvement in air quality in any area to which it shall apply.

**(g) Light-duty trucks up to 6,000 lbs. GVWR and light-duty vehicles; standards for model years after 1993**

**(1) NMHC, CO, and NOx**

Effective with respect to the model year 1994 and thereafter, the regulations under subsection (a) of this section applicable to emissions of nonmethane hydrocarbons (NMHC), carbon monoxide (CO), and oxides of nitrogen (NOx) from light-duty trucks (LDTs) of up to 6,000 lbs. gross vehicle weight rating (GVWR) and light-duty vehicles (LDVs) shall contain standards which provide that emissions from a percentage of each manufacturer's sales volume of such vehicles and trucks shall comply with the levels specified in table G. The percentage shall be as specified in the implementation schedule below:



TABLE G—EMISSION STANDARDS FOR NMHC, CO, AND $NO_x$ FROM LIGHT-DUTY TRUCKS OF UP TO 6,000 LBS. GVWR AND LIGHT—DUTY VEHICLES

| Vehicle Type | Column A (5 yrs/50,000 mi) | | | Column B (10 yrs/100,000 mi) | | |
|---|---|---|---|---|---|---|
| | NMHC | CO | $NO_x$ | NMHC | CO | $NO_x$ |
| LDTs (0-3,750 lbs. LVW) and light-duty vehicles..... | 0.25 | 3.4 | 0.4* | 0.31 | 4.2 | 0.6* |
| LDTs (3,751-5,750 lbs. LVW)..... | 0.32 | 4.4 | 0.7** | 0.40 | 5.5 | 0.97 |

Standards are expressed in grams per mile (gpm).

For standards under column A, for purposes of certification under section 7525 of this title, the applicable useful life shall be 5 years or 50,000 miles (or the equivalent), whichever first occurs.

For standards under column B, for purposes of certification under section 7525 of this title, the applicable useful life shall be 10 years or 100,000 miles (or the equivalent), whichever first occurs.

* In the case of diesel-fueled LDTs (0-3,750 lvw) and light-duty vehicles, before the model year 2004, in lieu of the 0.4 and 0.6 standards for $NO_x$, the applicable standards for $NO_x$ shall be 1.0 gpm for a useful life of 5 years or 50,000 miles (or the equivalent), whichever first occurs, and 1.25 gpm for a useful life of 10 years or 100,000 miles (or the equivalent), whichever first occurs.

** This standard does not apply to diesel-fueled LDTs (3,751-5,750 lbs. LVW).

IMPLEMENTATION SCHEDULE FOR TABLE G STANDARDS

| Model Year | Percentage* |
|---|---|
| 1994..... | 40 |
| 1995..... | 80 |
| After 1995..... | 100 |

*Percentages in the table refer to a percentage of each manufacturer's sales volume.

**(2) PM Standard**

Effective with respect to model year 1994 and thereafter in the case of light-duty vehicles, and effective with respect to the model year 1995 and thereafter in the case of light-duty trucks (LDTs) of up to 6,000 lbs. gross vehicle weight rating (GVWR), the regulations under subsection (a) of this section applicable to emissions of particulate matter (PM) from such vehicles and trucks shall contain standards which provide that such emissions from a percentage of each manufacturer's sales volume of such vehicles and trucks shall not exceed the levels specified in the table below. The percentage shall be as specified in the Implementation Schedule below.

PM STANDARD FOR LDTS
OF UP TO 6,000 LBS. GVWR

| Useful life period | Standard |
|---|---|
| 5/50,000 | 0.80 gpm |
| 10/100,000 | 0.10 gpm |

The applicable useful life, for purposes of certification under section 7525 of this title and for purposes of in-use compliance under section 7541 of this title, shall be 5 years or 50,000 miles (or the equivalent), whichever first occurs, in the case of the 5/50,000 standard.

The applicable useful life, for purposes of certification under section 7525 of this title and for purposes of in-use compliance under section 7541 of this title, shall be 10 years or 100,000 miles (or the equivalent), whichever first occurs in the case of the 10/100,000 standard.

IMPLEMENTATION SCHEDULE
FOR PM STANDARDS

| Model year | Light-duty vehicles | LTDs |
|---|---|---|
| 1994 | 40% * | ..... |
| 1995 | 80% * | 40% * |



| | | |
|---|---|---|
| 1996 | 100% * | 80% * |
| after 1996 | 100% * | 100% * |

*Percentages in the table refer to a percentage of each manufacturer's sales volume.

**(h) Light-duty trucks of more than 6,000 lbs. GVWR; standards for model years after 1995**

Effective with respect to the model year 1996 and thereafter, the regulations under subsection (a) of this section applicable to emissions of nonmethane hydrocarbons (NMHC), carbon monoxide (CO), oxides of nitrogen (NOx), and particulate matter (PM) from light-duty trucks (LDTs) of more than 6,000 lbs. gross vehicle weight rating (GVWR) shall contain standards which provide that emissions from a specified percentage of each manufacturer's sales volume of such trucks shall comply with the levels specified in table H. The specified percentage shall be 50 percent in model year 1996 and 100 percent thereafter.

TABLE H—EMISSION STANDARDS FOR
NMHC AND CO FROM GASOLINE AND
DIESEL FUELED LIGHT-DUTY TRUCKS
OF MORE THAN 6,000 LBS. GVWR

| LTD Test Weight | Column A (5 yrs/50,000 mi) | | | Column B (10 yrs/100,000 mi) | | | |
|---|---|---|---|---|---|---|---|
| | NMHC | CO | $NO_x$ | NMHC | CO | $NO_x$ | PM |
| 3,751-5,750 lbs. TW | 0.32 | 4.4 | 0.7* | 0.46 | 6.4 | 0.98 | 0.10 |
| Over 5,750 lbs. TW | 0.39 | 5.0 | 1.1* | 0.56 | 7.3 | 1.53 | 0.12 |

Standards are expressed in grams per mile (GPM).

For standards under column A, for purposes of certification under section 7525 of this title, the applicable useful life shall be 5 years or 50,000 miles (or the equivalent) whichever first occurs.

For standards under column B, for purposes of certification under section 7525 of this title, the applicable useful life shall be 11 years or 120,000 miles (or the equivalent), whichever first occurs.

* Not applicable to diesel-fueled LDTs.

**(i) Phase II study for certain light-duty vehicles and light-duty trucks**

**(1)** The Administrator, with the participation of the Office of Technology Assessment, shall study whether or not further reductions in emissions from light-duty vehicles and light-duty trucks should be required pursuant to this subchapter. The study shall consider whether to establish with respect to model years commencing after January 1, 2003, the standards and useful life period for gasoline and diesel-fueled light-duty vehicles and light-duty trucks with a loaded vehicle weight (LVW) of 3,750 lbs. or less specified in the following table:

TABLE 3—PENDING EMISSION STANDARDS FOR GASOLINE AND DIESEL FUELED LIGHT-DUTY VEHICLES AND LIGHT-DUTY TRUCKS 3,750 LBS. LVW OR LESS

| Pollutant | Emission level* |
|---|---|
| NMHC | 0.125 GPM |
| $NO_x$ | 0.2 GPM |
| CO | 1.7 gpm |

* Emission levels are expressed in grams per mile (GPM). For vehicles and engines subject to this subsection for purposes of subsection (d) of this section and any reference thereto, the useful life of such vehicles and engines shall be a period of 10 years or 100,000 miles (or the equivalent), whichever first occurs.

Such study shall also consider other standards and useful life periods which are more stringent or less stringent than those set forth in table 3 (but more stringent than those referred to in subsections (g) and (h) of this section).

**(2)(A)** As part of the study under paragraph (1), the Administrator shall examine the need for further reductions in emissions in order to attain or maintain the national ambient air quality standards, taking into consideration the waiver provisions of section 7543(b) of this title. As part of such study, the Administrator shall also examine—



**(i)** the availability of technology (including the costs thereof), in the case of light-duty vehicles and light-duty trucks with a loaded vehicle weight (LVW) of 3,750 lbs. or less, for meeting more stringent emission standards than those provided in subsections (g) and (h) of this section for model years commencing not earlier than after January 1, 2003, and not later than model year 2006, including the lead time and safety and energy impacts of meeting more stringent emission standards; and

**(ii)** the need for, and cost effectiveness of, obtaining further reductions in emissions from such light-duty vehicles and light-duty trucks, taking into consideration alternative means of attaining or maintaining the national primary ambient air quality standards pursuant to State implementation plans and other requirements of this chapter, including their feasibility and cost effectiveness.

**(B)** The Administrator shall submit a report to Congress no later than June 1, 1997, containing the results of the study under this subsection, including the results of the examination conducted under subparagraph (A). Before submittal of such report the Administrator shall provide a reasonable opportunity for public comment and shall include a summary of such comments in the report to Congress.

**(3)(A)** Based on the study under paragraph (1) the Administrator shall determine, by rule, within 3 calendar years after the report is submitted to Congress, but not later than December 31, 1999, whether—

**(i)** there is a need for further reductions in emissions as provided in paragraph (2)(A);

**(ii)** the technology for meeting more stringent emission standards will be available, as provided in paragraph (2)(A)(i), in the case of light-duty vehicles and light-duty trucks with a loaded vehicle weight (LVW) of 3,750 lbs. or less, for model years commencing not earlier than January 1, 2003, and not later than model year 2006, considering the factors listed in paragraph (2)(A)(i); and

**(iii)** obtaining further reductions in emissions from such vehicles will be needed and cost effective, taking into

consideration alternatives as provided in paragraph (2)(A)(ii).

The rulemaking under this paragraph shall commence within 3 months after submission of the report to Congress under paragraph (2)(B).

**(B)** If the Administrator determines under subparagraph (A) that—

**(i)** there is no need for further reductions in emissions as provided in paragraph (2)(A);

**(ii)** the technology for meeting more stringent emission standards will not be available as provided in paragraph (2)(A)(i), in the case of light-duty vehicles and light-duty trucks with a loaded vehicle weight (LVW) of 3,750 lbs. or less, for model years commencing not earlier than January 1, 2003, and not later than model year 2006, considering the factors listed in paragraph (2)(A)(i); or

**(iii)** obtaining further reductions in emissions from such vehicles will not be needed or cost effective, taking into consideration alternatives as provided in paragraph (2)(A)(ii),

the Administrator shall not promulgate more stringent standards than those in effect pursuant to subsections (g) and (h) of this section. Nothing in this paragraph shall prohibit the Administrator from exercising the Administrator's authority under subsection (a) of this section to promulgate more stringent standards for light-duty vehicles and light-duty trucks with a loaded vehicle weight (LVW) of 3,750 lbs. or less at any other time thereafter in accordance with subsection (a) of this section.

**(C)** If the Administrator determines under subparagraph (A) that—

**(i)** there is a need for further reductions in emissions as provided in paragraph (2)(A);

**(ii)** the technology for meeting more stringent emission standards will be available, as provided in paragraph (2)(A)(i), in the case of light-duty vehicles and light-duty trucks with a loaded vehicle weight (LVW) of



3,750 lbs. or less, for model years commencing not earlier than January 1, 2003, and not later than model year 2006, considering the factors listed in paragraph (2)(A)(i); and

**(iii)** obtaining further reductions in emissions from such vehicles will be needed and cost effective, taking into consideration alternatives as provided in paragraph (2)(A)(ii),

the Administrator shall either promulgate the standards (and useful life periods) set forth in Table 3 in paragraph (1) or promulgate alternative standards (and useful life periods) which are more stringent than those referred to in subsections (g) and (h) of this section. Any such standards (or useful life periods) promulgated by the Administrator shall take effect ~~with~~ respect to any such vehicles or engines no earlier than the model year 2003 but not later than model year 2006, as determined by the Administrator in the rule.

**(D)** Nothing in this paragraph shall be construed by the Administrator or by a court as a presumption that any standards (or useful life period) set forth in Table 3 shall be promulgated in the rulemaking required under this paragraph. The action required of the Administrator in accordance with this paragraph shall be treated as a nondiscretionary duty for purposes of section 7604(a)(2) of this title (relating to citizen suits).

**(E)** Unless the Administrator determines not to promulgate more stringent standards as provided in subparagraph (B) or to postpone the effective date of standards referred to in Table 3 in paragraph (1) or to establish alternative standards as provided in subparagraph (C), effective with respect to model years commencing after January 1, 2003, the regulations under subsection (a) of this section applicable to emissions of nonmethane hydrocarbons (NMHC), oxides of nitrogen (NOx), and carbon monoxide (CO) from motor vehicles and motor vehicle engines in the classes specified in Table 3 in paragraph (1) above shall contain standards which provide that emissions may not exceed the pending emission levels specified in Table 3 in paragraph (1).

**(j) Cold CO standard**

**(1) Phase I**

Not later than 12 months after November 15, 1990, the Administrator shall promulgate regulations under subsection (a) of this section applicable to emissions of carbon monoxide from 1994 and later model year light-duty vehicles and light-duty trucks when operated at 20 degrees Fahrenheit. The regulations shall contain standards which provide that emissions of carbon monoxide from a manufacturer's vehicles when operated at 20 degrees Fahrenheit may not exceed, in the case of light-duty vehicles, 10.0 grams per mile, and in the case of light-duty trucks, a level comparable in stringency to the standard applicable to light-duty vehicles. The standards shall take effect after model year 1993 according to a phase-in schedule which requires a percentage of each manufacturer's sales volume of light-duty vehicles and light-duty trucks to comply with applicable standards after model year 1993. The percentage shall be as specified in the following table:

PHASE-IN SCHEDULE FOR COLD START STANDARDS

| Model Year | Percentage |
|---|---|
| 1994 | 40 |
| 1995 | 80 |
| 1996 and after | 100 |

**(2) Phase II**

**(A)** Not later than June 1, 1997, the Administrator shall complete a study assessing the need for further reductions in emissions of carbon monoxide and the maximum reductions in such emissions achievable from model year 2001 and later model year light-duty vehicles and light-duty trucks when operated at 20 degrees Fahrenheit.

**(B)(i)** If as of June 1, 1997, 6 or more nonattainment areas have a carbon monoxide design value of 9.5 ppm or greater, the regulations under subsection (a)(1) of this section applicable to emissions of carbon monoxide from model year 2002 and later model year light-duty vehicles and



light-duty trucks shall contain standards which provide that emissions of carbon monoxide from such vehicles and trucks when operated at 20 degrees Fahrenheit may not exceed 3.4 grams per mile (gpm) in the case of light-duty vehicles and 4.4 grams per mile (gpm) in the case of light-duty trucks up to 6,000 GVWR and a level comparable in stringency in the case of light-duty trucks 6,000 GVWR and above.

**(ii)** In determining for purposes of this subparagraph whether 6 or more nonattainment areas have a carbon monoxide design value of 9.5 ppm or greater, the Administrator shall exclude the areas of Steubenville, Ohio, and Oshkosh, Wisconsin.

**(3) Useful-life for phase I and phase II standards**

In the case of the standards referred to in paragraphs (1) and (2), for purposes of certification under section 7525 of this title and in-use compliance under section 7541 of this title, the applicable useful life period shall be 5 years or 50,000 miles, whichever first occurs, except that the Administrator may extend such useful life period (for purposes of section 7525 of this title, or section 7541 of this title, or both) if he determines that it is feasible for vehicles and engines subject to such standards to meet such standards for a longer useful life. If the Administrator extends such useful life period, the Administrator may make an appropriate adjustment of applicable standards for such extended useful life. No such extended useful life shall extend beyond the useful life period provided in regulations under subsection (d) of this section.

**(4) Heavy-duty vehicles and engines**

The Administrator may also promulgate regulations under subsection (a)(1) of this section applicable to emissions of carbon monoxide from heavy-duty vehicles and engines when operated at cold temperatures.

**(k) Control of evaporative emissions**

The Administrator shall promulgate (and from time to time revise) regulations applicable to evaporative emissions of hydrocarbons from all gasoline-fueled motor vehicles—

(1) during operation; and

(2) over 2 or more days of nonuse;

under ozone-prone summertime conditions (as determined by regulations of the Administrator). The regulations shall take effect as expeditiously as possible and shall require the greatest degree of emission reduction achievable by means reasonably expected to be available for production during any model year to which the regulations apply, giving appropriate consideration to fuel volatility, and to cost, energy, and safety factors associated with the application of the appropriate technology. The Administrator shall commence a rulemaking under this subsection within 12 months after November 15, 1990. If final regulations are not promulgated under this subsection within 18 months after November 15, 1990, the Administrator shall submit a statement to the Congress containing an explanation of the reasons for the delay and a date certain for promulgation of such final regulations in accordance with this chapter. Such date certain shall not be later than 15 months after the expiration of such 18 month deadline.

**(l) Mobile source-related air toxics**

**(1) Study**

Not later than 18 months after November 15, 1990, the Administrator shall complete a study of the need for, and feasibility of, controlling emissions of toxic air pollutants which are unregulated under this chapter and associated with motor vehicles and motor vehicle fuels, and the need for, and feasibility of, controlling such emissions and the means and measures for such controls. The study shall focus on those categories of emissions that pose the greatest risk to human health or about which significant uncertainties remain, including emissions of benzene, formaldehyde, and 1, 3 butadiene. The proposed report shall be available for public review and comment and shall include a summary of all comments.

**(2) Standards**

Within 54 months after November 15, 1990, the Administrator shall, based on the study under paragraph (1),



promulgate (and from time to time revise) regulations under subsection (a)(1) of this section or section 7545(c)(1) of this title containing reasonable requirements to control hazardous air pollutants from motor vehicles and motor vehicle fuels. The regulations shall contain standards for such fuels or vehicles, or both, which the Administrator determines reflect the greatest degree of emission reduction achievable through the application of technology which will be available, taking into consideration the standards established under subsection (a) of this section, the availability and costs of the technology, and noise, energy, and safety factors, and lead time. Such regulations shall not be inconsistent with standards under subsection (a) of this section. The regulations shall, at a minimum, apply to emissions of benzene and formaldehyde.

**(m) Emissions control diagnostics**

**(1) Regulations**

Within 18 months after November 15, 1990, the Administrator shall promulgate regulations under subsection (a) of this section requiring manufacturers to install on all new light duty vehicles and light duty trucks diagnostics systems capable of—

(A) accurately identifying for the vehicle's useful life as established under this section, emission-related systems deterioration or malfunction, including, at a minimum, the catalytic converter and oxygen sensor, which could cause or result in failure of the vehicles to comply with emission standards established under this section,

(B) alerting the vehicle's owner or operator to the likely need for emission-related components or systems maintenance or repair,

(C) storing and retrieving fault codes specified by the Administrator, and

(D) providing access to stored information in a manner specified by the Administrator.

The Administrator may, in the Administrator's discretion, promulgate regulations requiring manufacturers to install

such onboard diagnostic systems on heavy-duty vehicles and engines.

**(2) Effective date**

The regulations required under paragraph (1) of this subsection shall take effect in model year 1994, except that the Administrator may waive the application of such regulations for model year 1994 or 1995 (or both) with respect to any class or category of motor vehicles if the Administrator determines that it would be infeasible to apply the regulations to that class or category in such model year or years, consistent with corresponding regulations or policies adopted by the California Air Resources Board for such systems.

**(3) State inspection**

The Administrator shall by regulation require States that have implementation plans containing motor vehicle inspection and maintenance programs to amend their plans within 2 years after promulgation of such regulations to provide for inspection of onboard diagnostics systems (as prescribed by regulations under paragraph (1) of this subsection) and for the maintenance or repair of malfunctions or system deterioration identified by or affecting such diagnostics systems. Such regulations shall not be inconsistent with the provisions for warranties promulgated under section 7541(a) and (b) of this title.

**(4) Specific requirements**

In promulgating regulations under this subsection, the Administrator shall require—

**(A)** that any connectors through which the emission control diagnostics system is accessed for inspection, diagnosis, service, or repair shall be standard and uniform on all motor vehicles and motor vehicle engines;

**(B)** that access to the emission control diagnostics system through such connectors shall be unrestricted and shall not require any access code or any device which is only available from a vehicle manufacturer; and



**(C)** that the output of the data from the emission control diagnostics system through such connectors shall be usable without the need for any unique decoding information or device.

**(5) Information availability**

The Administrator, by regulation, shall require (subject to the provisions of section 7542(c) of this title regarding the protection of methods or processes entitled to protection as trade secrets) manufacturers to provide promptly to any person engaged in the repairing or servicing of motor vehicles or motor vehicle engines, and the Administrator for use by any such persons, with any and all information needed to make use of the emission control diagnostics system prescribed under this subsection and such other information including instructions for making emission related diagnosis and repairs. No such information may be withheld under section 7542(c) of this title if that information is provided (directly or indirectly) by the manufacturer to franchised dealers or other persons engaged in the repair, diagnosing, or servicing of motor vehicles or motor vehicle engines. Such information shall also be available to the Administrator, subject to section 7542(c) of this title, in carrying out the Administrator's responsibilities under this section.

**(f) [FN4] Model years after 1990**

For model years prior to model year 1994, the regulations under subsection (a) of this section applicable to buses other than those subject to standards under section 7554 of this title shall contain a standard which provides that emissions of particulate matter (PM) from such buses may not exceed the standards set forth in the following table:

PM STANDARD FOR BUSES

| Model year | Standard* |
|---|---|
| 1991 | 0.25 |
| 1992 | 0.25 |
| 1993 and thereafter | 0.10 |

* Standards are expressed in grams per brake horsepower hour (g/bhp/hr).

[1] So in original. Probably should be "(4)".

[2] So in original. Probably should be "paragraph".

[3] Another subsec. (f) (f) is set out following subsec. (m).

[4] So in original. Probably should be (n).



**[CAA § 203] 42 U.S.C. § 7522. Prohibited acts**

**(a) Enumerated prohibitions**

The following acts and the causing thereof are prohibited—

**(1)** in the case of a manufacturer of new motor vehicles or new motor vehicle engines for distribution in commerce, the sale, or the offering for sale, or the introduction, or delivery for introduction, into commerce, or (in the case of any person, except as provided by regulation of the Administrator), the importation into the United States, of any new motor vehicle or new motor vehicle engine, manufactured after the effective date of regulations under this part which are applicable to such vehicle or engine unless such vehicle or engine is covered by a certificate of conformity issued (and in effect) under regulations prescribed under this part or part C in the case of clean-fuel vehicles (except as provided in subsection (b) of this section);

**(2)(A)** for any person to fail or refuse to permit access to or copying of records or to fail to make reports or provide information required under section 7542 of this title;

**(B)** for any person to fail or refuse to permit entry, testing or inspection authorized under section 7525(c) of this title or section 7542 of this title;

**(C)** for any person to fail or refuse to perform tests, or have tests performed as required under section 7542 of this title;

**(D)** for any manufacturer to fail to make information available as provided by regulation under section 7521(m)(5) of this title;

**(3)(A)** for any person to remove or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under this subchapter prior to its sale and delivery to the ultimate purchaser, or for any person knowingly to remove or render inoperative any such device or element of design after such sale and delivery to the ultimate purchaser; or

**(B)** for any person to manufacture or sell, or offer to sell, or install, any part or component intended for use with, or as part of, any motor vehicle or motor vehicle engine, where a principal effect of the part or component is to bypass, defeat, or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under this subchapter, and where the person knows or should know that such part or component is being offered for sale or installed for such use or put to such use; or

**(4)** for any manufacturer of a new motor vehicle or new motor vehicle engine subject to standards prescribed under section 7521 of this title or part C of this subchapter—

**(A)** to sell or lease any such vehicle or engine unless such manufacturer has complied with (i) the requirements of section 7541(a) and (b) of this title with respect to such vehicle or engine, and unless a label or tag is affixed to such vehicle or engine in accordance with section 7541(c)(3) of this title, or (ii) the corresponding requirements of part C of this subchapter in the case of clean fuel vehicles unless the manufacturer has complied with the corresponding requirements of part C of this subchapter **[FN1]**

**(B)** to fail or refuse to comply with the requirements of section 7541(c) or (e) of this title, or the corresponding requirements of part C of this subchapter in the case of clean fuel vehicles **[FN1]**

**(C)** except as provided in subsection (c)(3) of section 7541 of this title and the corresponding requirements of part C of this subchapter in the case of clean fuel vehicles, to provide directly or indirectly in any communication to the ultimate purchaser or any subsequent purchaser that the coverage of any warranty under this chapter is conditioned upon use of any part, component, or system manufactured by such manufacturer or any person acting for such manufacturer or under his control, or conditioned upon service performed by any such person, or



**(D)** to fail or refuse to comply with the terms and conditions of the warranty under section 7541(a) or (b) of this title or the corresponding requirements of part C of this subchapter in the case of clean fuel vehicles with respect to any vehicle; or

**(5)** for any person to violate section 7553 of this title, 7554 of this title, or part C of this subchapter or any regulations under section 7553 of this title, 7554 of this title, or part C of this subchapter.

No action with respect to any element of design referred to in paragraph (3) (including any adjustment or alteration of such element) shall be treated as a prohibited act under such paragraph (3) if such action is in accordance with section 7549 of this title. Nothing in paragraph (3) shall be construed to require the use of manufacturer parts in maintaining or repairing any motor vehicle or motor vehicle engine. For the purposes of the preceding sentence, the term "manufacturer parts" means, with respect to a motor vehicle engine, parts produced or sold by the manufacturer of the motor vehicle or motor vehicle engine. No action with respect to any device or element of design referred to in paragraph (3) shall be treated as a prohibited act under that paragraph if (i) the action is for the purpose of repair or replacement of the device or element, or is a necessary and temporary procedure to repair or replace any other item and the device or element is replaced upon completion of the procedure, and (ii) such action thereafter results in the proper functioning of the device or element referred to in paragraph (3). No action with respect to any device or element of design referred to in paragraph (3) shall be treated as a prohibited act under that paragraph if the action is for the purpose of a conversion of a motor vehicle for use of a clean alternative fuel (as defined in this subchapter) and if such vehicle complies with the applicable standard under section 7521 of this title when operating on such fuel, and if in the case of a clean alternative fuel vehicle (as defined by rule by the Administrator), the device or element is replaced upon completion of the conversion procedure and such action

results in proper functioning of the device or element when the motor vehicle operates on conventional fuel.

**(b) Exemptions; refusal to admit vehicle or engine into United States; vehicles or engines intended for export**

**(1)** The Administrator may exempt any new motor vehicle or new motor vehicle engine, from subsection (a) of this section, upon such terms and conditions as he may find necessary for the purpose of research, investigations, studies, demonstrations, or training, or for reasons of national security.

**(2)** A new motor vehicle or new motor vehicle engine offered for importation or imported by any person in violation of subsection (a) of this section shall be refused admission into the United States, but the Secretary of the Treasury and the Administrator may, by joint regulation, provide for deferring final determination as to admission and authorizing the delivery of such a motor vehicle or engine offered for import to the owner or consignee thereof upon such terms and conditions (including the furnishing of a bond) as may appear to them appropriate to insure that any such motor vehicle or engine will be brought into conformity with the standards, requirements, and limitations applicable to it under this part. The Secretary of the Treasury shall, if a motor vehicle or engine is finally refused admission under this paragraph, cause disposition thereof in accordance with the customs laws unless it is exported, under regulations prescribed by such Secretary, within ninety days of the date of notice of such refusal or such additional time as may be permitted pursuant to such regulations, except that disposition in accordance with the customs laws may not be made in such manner as may result, directly or indirectly, in the sale, to the ultimate consumer, of a new motor vehicle or new motor vehicle engine that fails to comply with applicable standards of the Administrator under this part.

**(3)** A new motor vehicle or new motor vehicle engine intended solely for export, and so labeled or tagged on the outside of the container and on the vehicle or engine itself, shall be subject to the provisions of subsection (a) of this



section, except that if the country which is to receive such vehicle or engine has emission standards which differ from the standards prescribed under section 7521 of this title, then such vehicle or engine shall comply with the standards of such country which is to receive such vehicle or engine.

[1] So in original. Probably should be followed by a comma.

[2] So in original. Probably should be "act".

**[CAA § 209] 42 U.S.C. § 7543. State standards**

**(a) Prohibition**

No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

**(b) Waiver**

**(1)** The Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such waiver shall be granted if the Administrator finds that—

**(A)** the determination of the State is arbitrary and capricious,

**(B)** such State does not need such State standards to meet compelling and extraordinary conditions, or

**(C)** such State standards and accompanying enforcement procedures are not consistent with section 7521(a) of this title.

**(2)** If each State standard is at least as stringent as the comparable applicable Federal standard, such State standard shall be deemed to be at least as protective of health and welfare as such Federal standards for purposes of paragraph (1).

**(3)** In the case of any new motor vehicle or new motor vehicle engine to which State standards apply pursuant to a waiver granted under paragraph (1), compliance with such



State standards shall be treated as compliance with applicable Federal standards for purposes of this subchapter.

**(c) Certification of vehicle parts or engine parts**

Whenever a regulation with respect to any motor vehicle part or motor vehicle engine part is in effect under section 7541(a)(2) of this title, no State or political subdivision thereof shall adopt or attempt to enforce any standard or any requirement of certification, inspection, or approval which relates to motor vehicle emissions and is applicable to the same aspect of such part. The preceding sentence shall not apply in the case of a State with respect to which a waiver is in effect under subsection (b) of this section.

**(d) Control, regulation, or restrictions on registered or licensed motor vehicles**

Nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles.

**(e) Nonroad engines or vehicles**

**(1) Prohibition on certain State standards**

No State or any political subdivision thereof shall adopt or attempt to enforce any standard or other requirement relating to the control of emissions from either of the following new nonroad engines or nonroad vehicles subject to regulation under this chapter—

**(A)** New engines which are used in construction equipment or vehicles or used in farm equipment or vehicles and which are smaller than 175 horsepower.

**(B)** New locomotives or new engines used in locomotives.

Subsection (b) of this section shall not apply for purposes of this paragraph.

**(2) Other nonroad engines or vehicles**

**(A)** In the case of any nonroad vehicles or engines other than those referred to in subparagraph (A) or (B) of paragraph (1), the Administrator shall, after notice and opportunity for public hearing, authorize California to adopt and enforce standards and other requirements relating to the control of emissions from such vehicles or engines if California determines that California standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such authorization shall be granted if the Administrator finds that—

**(i)** the determination of California is arbitrary and capricious,

**(ii)** California does not need such California standards to meet compelling and extraordinary conditions, or

**(iii)** California standards and accompanying enforcement procedures are not consistent with this section.

**(B)** Any State other than California which has plan provisions approved under part D of subchapter I of this chapter may adopt and enforce, after notice to the Administrator, for any period, standards relating to control of emissions from nonroad vehicles or engines (other than those referred to in subparagraph (A) or (B) of paragraph (1)) and take such other actions as are referred to in subparagraph (A) of this paragraph respecting such vehicles or engines if—

**(i)** such standards and implementation and enforcement are identical, for the period concerned, to the California standards authorized by the Administrator under subparagraph (A), and

**(ii)** California and such State adopt such standards at least 2 years before commencement of the period for which the standards take effect.

The Administrator shall issue regulations to implement this subsection.



**[CAA § 246] 42 U.S.C. § 7586. Centrally fueled fleets**

**(a) Fleet program required for certain nonattainment areas**

**(1) SIP revision**

Each State in which there is located all or part of a covered area (as defined in paragraph (2)) shall submit, within 42 months after November 15, 1990, a State implementation plan revision under section 7410 of this title and part D of subchapter I of this chapter to establish a clean-fuel vehicle program for fleets under this section.

**(2) Covered areas**

For purposes of this subsection, each of the following shall be a "covered area":

**(A) Ozone nonattainment areas**

Any ozone nonattainment area with a 1980 population of 250,000 or more classified under subpart 2 of part D of subchapter I of this chapter as Serious, Severe, or Extreme based on data for the calendar years 1987, 1988, and 1989. In determining the ozone nonattainment areas to be treated as covered areas pursuant to this subparagraph, the Administrator shall use the most recent interpretation methodology issued by the Administrator prior to November 15, 1990.

**(B) Carbon monoxide nonattainment areas**

Any carbon monoxide nonattainment area with a 1980 population of 250,000 or more and a carbon monoxide design value at or above 16.0 parts per million based on data for calendar years 1988 and 1989 (as calculated according to the most recent interpretation methodology issued prior to November 15, 1990, by the United States Environmental Protection Agency), excluding those carbon monoxide nonattainment areas in which mobile sources do not contribute significantly to carbon monoxide exceedances.

**(3) Plan revisions for reclassified areas**

In the case of ozone nonattainment areas reclassified as Serious, Severe, or Extreme under part D of subchapter I of this chapter with a 1980 population of 250,000 or more, the

State shall submit a plan revision meeting the requirements of this subsection within 1 year after reclassification. Such plan revision shall implement the requirements applicable under this subsection at the time of reclassification and thereafter, except that the Administrator may adjust for a limited period the deadlines for compliance where compliance with such deadlines would be infeasible.

**(4) Consultation; consideration of factors**

Each State required to submit an implementation plan revision under this subsection shall develop such revision in consultation with fleet operators, vehicle manufacturers, fuel producers and distributors, motor vehicle fuel, and other interested parties, taking into consideration operational range, specialty uses, vehicle and fuel availability, costs, safety, resale values of vehicles and equipment and other relevant factors.

**(b) Phase-in of requirements**

The plan revision required under this section shall contain provisions requiring that at least a specified percentage of all new covered fleet vehicles in model year 1998 and thereafter purchased by each covered fleet operator in each covered area shall be clean-fuel vehicles and shall use clean alternative fuels when operating in the covered area. For the applicable model years (MY) specified in the following table and thereafter, the specified percentage shall be as provided in the table for the vehicle types set forth in the table:

Clean Fuel Vehicle Phase-In Requirements for Fleets

| Vehicle Type | MY1998 | MY1999 | MY2000 |
|---|---|---|---|
| Light duty trucks up to 6,000 lbs. GVWR and light-duty vehicles..... | 30% | 50% | 70% |
| Heavy-duty trucks above 8,500 lbs GVWR..... | 50% | 50% | 50% |

The term MY refers to model year.



**(c) Accelerated standard for light-duty trucks up to 6,000 lbs. GVWR and light- duty vehicles**

Notwithstanding the model years for which clean-fuel vehicle standards are applicable as provided in section 7583 of this title, for purposes of this section, light duty **[FN1]** trucks of up to 6,000 lbs. GVWR and light-duty vehicles manufactured in model years 1998 through model year 2000 shall be treated as clean-fuel vehicles only if such vehicles comply with the standards applicable under section 7583 of this title for vehicles in the same class for the model year 2001. The requirements of subsection (b) of this section shall take effect on the earlier of the following:

(1) The first model year after model year 1997 in which new light-duty trucks up to 6,000 lbs. GVWR and light-duty vehicles which comply with the model year 2001 standards under section 7583 of this title are offered for sale in California.

(2) Model year 2001.

Whenever the effective date of subsection (b) of this section is delayed pursuant to paragraph (1) of this subsection, the phase-in schedule under subsection (b) of this section shall be modified to commence with the model year referred to in paragraph (1) in lieu of model year 1998.

**(d) Choice of vehicles and fuel**

The plan revision under this subsection shall provide that the choice of clean- fuel vehicles and clean alternative fuels shall be made by the covered fleet operator subject to the requirements of this subsection.

**(e) Availability of clean alternative fuel**

The plan revision shall require fuel providers to make clean alternative fuel available to covered fleet operators at locations at which covered fleet vehicles are centrally fueled.

**(f) Credits**

**(1) Issuance of credits**

The State plan revision required under this section shall provide for the issuance by the State of appropriate credits

to a fleet operator for any of the following (or any combination thereof):

**(A)** The purchase of more clean-fuel vehicles than required under this section.

**(B)** The purchase of clean fuel **[FN2]** vehicles which meet more stringent standards established by the Administrator pursuant to paragraph (4).

**(C)** The purchase of vehicles in categories which are not covered by this section but which meet standards established for such vehicles under paragraph (4).

**(2) Use of credits; limitations based on weight classes**

**(A) Use of credits**

Credits under this subsection may be used by the person holding such credits to demonstrate compliance with this section or may be traded or sold for use by any other person to demonstrate compliance with other requirements applicable under this section in the same nonattainment area. Credits obtained at any time may be held or banked for use at any later time, and when so used, such credits shall maintain the same value as if used at an earlier date.

**(B) Limitations based on weight classes**

Credits issued with respect to the purchase of vehicles of up to 8,500 lbs. GVWR may not be used to demonstrate compliance by any person with the requirements applicable under this subsection to vehicles of more than 8,500 lbs. GVWR. Credits issued with respect to the purchase of vehicles of more than 8,500 lbs. GVWR may not be used to demonstrate compliance by any person with the requirements applicable under this subsection to vehicles weighing up to 8,500 lbs. GVWR.

**(C) Weighting**

Credits issued for purchase of a clean fuel **[FN2]** vehicle under this subsection shall be adjusted with appropriate weighting to reflect the level of emission reduction achieved by the vehicle.



**(3) Regulations and administration**

Within 12 months after November 15, 1990, the Administrator shall promulgate regulations for such credit program. The State shall administer the credit program established under this subsection.

**(4) Standards for issuing credits for cleaner vehicles**

Solely for purposes of issuing credits under paragraph (1)(B), the Administrator shall establish under this paragraph standards for Ultra-Low Emission Vehicles ("ULEV"s) and Zero Emissions Vehicles ("ZEV"s) which shall be more stringent than those otherwise applicable to clean-fuel vehicles under this part. The Administrator shall certify clean fuel **[FN2]** vehicles as complying with such more stringent standards, and administer and enforce such more stringent standards, in the same manner as in the case of the otherwise applicable clean-fuel vehicle standards established under this section. The standards established by the Administrator under this paragraph for vehicles under 8,500 lbs. GVWR or greater shall conform as closely as possible to standards which are established by the State of California for ULEV and ZEV vehicles in the same class. For vehicles of 8,500 lbs. GVWR or more, the Administrator shall promulgate comparable standards for purposes of this subsection.

**(5) Early fleet credits**

The State plan revision shall provide credits under this subsection to fleet operators that purchase vehicles certified to meet clean-fuel vehicle standards under this part during any period after approval of the plan revision and prior to the effective date of the fleet program under this section.

**(g) Availability to public**

At any facility owned or operated by a department, agency, or instrumentality of the United States where vehicles subject to this subsection are supplied with clean alternative fuel, such fuel shall be offered for sale to the public for use in other vehicles during reasonable business times and subject to national security concerns, unless such

fuel is commercially available for vehicles in the vicinity of such Federal facilities.

**(h) Transportation control measures**

The Administrator shall by rule, within 1 year after November 15, 1990, ensure that certain transportation control measures including time-of-day or day-of-week restrictions, and other similar measures that restrict vehicle usage, do not apply to any clean-fuel vehicle that meets the requirements of this section. This subsection shall apply notwithstanding subchapter I of this chapter.

CREDIT(S)

(July 14, 1955, c. 360, Title II, § 246, as added Nov. 15, 1990, Pub.L. 101- 549, Title II, § 229(a), 104 Stat. 2520.)

**[FN1]** So in original. Probably should be "light-duty".
**[FN2]** So in original. Probably should be "clean-fuel".



**63 Fed. Reg. 20103 (Apr. 23, 1998)**

**RULES and REGULATIONS**
**ENVIRONMENTAL PROTECTION AGENCY**
**40 CFR Part 88**
**[FRL-5994-5]**
**RIN 2060-AH56**
**Clean Fuel Fleet Program**

Thursday, April 23, 1998

**AGENCY:** Environmental Protection Agency.

**ACTION:** Direct final rule; delay of implementation date.

**SUMMARY:** The provisions of subpart C of Title II of the Clean Air Act require states with certain ozone and carbon monoxide (CO) nonattainment areas to revise their State Implementation Plans (SIP) to incorporate a Clean Fuel Fleet *20104 Program. Under this program, specified percentages of new vehicles acquired by covered fleet operators in certain ozone and CO nonattainment areas must meet EPA's clean-fuel vehicle (CFV) emissions standards. Today's action delays by one model year, the requirement that a covered area's State Implementation Plan implement a Clean Fuel Fleet Program (CFFP) fleet operator purchase requirement. As a result, EPA may approve a CFFP SIP revision which provides that covered fleet operators must include a certain percentage of CFVs in their fleet vehicle purchases each year beginning with model year 1999. This action is intended to ensure successful implementation of the CFFP, and to ensure that an adequate supply of appropriate vehicles is available for fleet operators to purchase and use once the program is underway, so that compliance with the mandatory purchase requirements will be possible and economically feasible for covered fleet operators.

**DATES:** This rule will become effective on June 8, 1998 unless the Agency receives relevant adverse comment by May 26, 1998. Should the Agency receive such comments, it will publish notification withdrawing this rule.

**ADDRESSES:** Interested parties may submit written comments in response to this rule (in duplicate if possible) to Public Docket No. A-97-53. It is requested that a duplicate copy may be submitted to Sally Newstead at the address in the FOR FURTHER INFORMATION CONTACT section below. The docket is located at the Air Docket, Room M-1500 (6102), Waterside Mall SW, Washington, DC 20460. The docket may be inspected between 8:00 a.m. and 5:30 p.m. on weekdays, excluding holidays. A reasonable fee may be charged for copying docket material.

**FOR FURTHER INFORMATION CONTACT:** Sally Newstead, Office of Mobile Sources, National Vehicle and Fuel Emissions Laboratory, 2565 Plymouth Road, Ann Arbor, Michigan 48105. Telephone (734) 668-4474.

**SUPPLEMENTARY INFORMATION:**

**Statutory Authority**

The statutory authority for this action is provided by sections 246 and 301 of the Clean Air Act.

**Background**

EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial action and anticipates no adverse comments. However, in the proposed rules section of this Federal Register publication, EPA is publishing a separate document that will serve as the proposal for this action should relevant adverse comments be filed. This rule will be effective June 8, 1998 without further notice unless the Agency receives relevant adverse comments by May 26, 1998. If EPA receives such comments, EPA will publish a document withdrawing this final rule and informing the public that the rule did not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on the proposed rule.

The Clean Air Act, as amended in 1990 ("CAA" or "the Act"), requires certain states to adopt and submit to EPA a State Implementation Plan (SIP) containing a CFFP for nonattainment areas with 1980 populations greater than



250,000 that are classified as serious or worse for ozone, or with a design value of at least 16.0 ppm for carbon monoxide (CO). The nonattainment areas currently covered by the requirement to adopt and submit a CFFP are Atlanta, Washington DC metropolitan area, Chicago-Gary-Lake Counties, Milwaukee-Racine, Baton Rouge, and Denver-Boulder.[1]

Section 246 of the CAA provides that a states' SIP submission must require fleet operators with 10 or more vehicles that are centrally fueled or capable of being centrally fueled, to include a specified percentage of clean-fuel vehicles (CFVs) in their new vehicle purchases each year. In addition, states CFFP SIP submissions must comply with other specifications in Section 246, including the requirement that covered fleet operators must operate their CFVs in covered nonattainment areas on a clean alternative fuel, defined as a fuel on which the vehicle meets EPA's CFV standards when using such fuel. EPA promulgated emissions standards for CFVs in September 1994. See 40 CFR Part 88. EPA estimates that demand for CFVs by covered fleets in model year[2] 1998 would be approximately 47,000 light duty vehicles and 12,000 heavy duty vehicles.

**Start Date for CFFP Purchase Requirement**

Section 246(c) of the CAA provides that the specified percentage of new light duty vehicle purchases by covered

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[1] States with covered nonattainment areas may opt out of the CFFP with an adequate substitute program. See CAA Section 182(c)(4)(B). Eleven states have opted out of the CFFP pursuant to this provision. Areas reclassified for ozone, that have a 1980 population of at least 250,000, must also submit a SIP revision with a CFFP within one year of such reclassification. See CAA Section 246(a)(3).

[2] A "model year" for purposes of fleet operators' compliance with CFFP purchase requirements, and as used in this notice, is not the same as "model year" as defined for purposes of motor vehicle production. The definition of "model year" for the CFFP means September 1 of the preceding year through August 31 of the named year. Therefore, model year 1998 for the CFFP runs from September 1, 1997 through August 31, 1998. See 40 CFR 88.302-94.

fleet operators that must be CFVs in a given model year shall be 30% in model year 1998, 50% in model year 1999, and 70% in model year 2000 and later years, if certain categories of new vehicles (light duty trucks (LDTs) below 6000 lbs gross vehicle weight rating (GVWR) and light duty vehicles (LDVs)) certified to the Phase II CFV exhaust emissions standards are offered for sale in California.[3] In March 1993, EPA stated its expectation that the vehicles specified in Section 246(c) would be offered for sale in California by model year 1997, and therefore states' SIP submissions should provide for implementation of the CFFP purchase requirement beginning in model year 1998. EPA also stated its intent to delay this implementation date if it later determined that the requisite vehicles would not be offered for sale in California in model year 1997. See 58 FR 11888 (March 1, 1993).

EPA cannot mandate that vehicle manufacturers produce CFVs for fleets to purchase to meet the CFFP requirements—Congress intended that the creation of a market for CFVs would provide an incentive for vehicle manufacturers to produce and sell such vehicles outside California, ultimately resulting in broader market penetration. The specification in section 246 (c) that certain vehicles meeting CFV exhaust emissions standards must be available for sale in California for implementation of the CFFP purchase requirement to begin in model year 1998 was intended to provide a minimum level of reasonable assurance that complying vehicle technology was available and being produced.[4] Without some such evidence of vehicle availability, fleet operators cannot realistically be expected

[3] The Phase II CFV exhaust emissions standards are found in CAA Section 243(a)(2) and 243(b)(2), and include standards for non-methane organic gases (NMOG), CO, oxides of nitrogen (NOX), particulate matter (PM), and formaldehyde that are identical to California's Low Emission Vehicle (LEV) exhaust emissions standards.

[4] *See A Legislative History of the Clean Air Act Amendments of 1990*, Volume 1 at 903.



to comply with the CFFP purchase requirements. However, Section 246 is not clear on the issue of how many of the vehicles specified in Section 246(c) must be offered for sale in California before triggering ***20105** implementation of the CFFP purchase requirements.

In today's action, EPA is delaying the start date that the SIP must contain for implementation of the CFFP purchase requirements from model year 1998 to model year 1999, and intends to approve state SIP submissions with CFFPs that start in model year 1999. EPA has received information from various stakeholders, including states, covered fleet operators, and vehicle manufacturers on this issue, and has concluded that a delay until model year 1999 will result in a successful, effective fleet program that advances the penetration of CFVs and clean alternative fuels into the national market, and is consistent with the provisions of Section 246(c) and with Congress' intent in adopting the CFFP provisions of the Act.

The legislative history of the 1990 amendments to the CAA indicates that, in adopting the CFFP, Congress made a clear choice between two alternatives: requiring auto manufacturers to produce and sell CFVs, or creating a market for CFVs and for clean alternative fuels by requiring fleet operators to purchase such vehicles and operate on such fuels. In choosing the latter option, Congress attempted to minimize the burden on fleet operators by requiring some evidence of vehicle availability in California as a precondition to implementation of the purchase requirement before model year 2001. However, the Act does not provide a clear indication of Congressional intent regarding the number of vehicles in each weight category specified in Section 246(c) that must be offered for sale in California to trigger the fleet operators' purchase requirement. Because the CAA is silent on this particular issue, and in the absence of a clear indication of Congressional intent, it is appropriate for EPA to reasonably exercise its discretion in a way that furthers the goals of the CFFP provisions, and determine whether a sufficient number of requisite vehicle models are offered for

sale in California to require that other states SIPs implement the CFFP in MY1998.

Auto manufacturers have certified a number of vehicle models to the LEV standards in California on California reformulated gasoline, and EPA expects these vehicles could be certified as federal CFVs. However, because of the Act's requirement that fleet operators operate CFVs on clean alternative fuels, as defined in Section 241(b), fleet operators who purchase such CFVs to meet CFFP purchase requirements may have to operate these vehicles on California reformulated gasoline, which is generally not available outside California. EPA cannot conclude at this time that federal reformulated gasoline or federal conventional gasoline qualify as clean alternative fuels for CFVs certified to LEV standards on California reformulated gasoline, due to potential emissions differences resulting from differences in fuel composition between California reformulated gasoline and federal fuels. EPA expects that manufacturers could certify LEVs that have been certified to California LEV standards on California reformulated gasoline as federal CFVs on federal fuels—if manufacturers did so, fleet operators could purchase such vehicles to meet CFFP purchase requirements, and operate them on federal fuels in covered nonattainment areas without violating the fuel use requirement of the CFFP. Certain new light duty trucks (LDTs) below 6000 pounds GVWR and new light duty vehicles (LDVs) certified to LEV exhaust emissions standards are currently being offered for sale in California. However, only a limited number of LDTs below 6000 lbs. GVWR were certified to California's LEV standards and offered for sale in California in MY1997 as indicated in the following chart.

List of Certified CA LEVs Offered for Sale in California in MY97
[As of April 1997]

| Manufacturer | Certification Number | Models | Type | Standard | Fuel |
|---|---|---|---|---|---|
| Ford..... | FORD-LDV-97-01-00..... | Escort, Escort Wagon..... | LDV<br>LDV | LEV<br>LEV | CA RFG.<br>CA RFG. |
| | FORD-LDV-97-38-00..... | Sable, Sable Wagon, Taurus, Taurus Wagon..... | | | |
| General Motors..... | GM-LDT-97-29-00..... | Astro (C&P)*<br>Passenger..... | LDT<br>LDT | LEV<br>LEV | CA RFG.<br>CA RFG. |
| | GM-LDT-97-40-00..... | Safari AWD (P), Astro AWD (C&P)... | | | CA RFG. |
| Honda..... | HONDA-LDV-97-19-00..... | Civic, del Sol... | LDV | LEV | CA RFG. |
| | HONDA-LDV-97-20-00..... | Civic..... | LDV | LEV | CA RFG. |
| | HONDA-LDV-97-21-00..... | Civic, del Sol... | LDV | LEV | CA RFG. |
| | HONDA-LDV-97-22-00..... | Civic..... | LDV | LEV | CA RFG. |
| Nissan..... | NISSN-LDV-97-06-00..... | Sentra/200SX. | LDV | LEV | CA RFG. |
| Suzuki..... | SUZUK-LDV-97-05-00..... | Metro..... | LDV | LEV | CA RFG. |
| | SUZUK-LDV-97-06-00..... | Metro Swift.... | LDV | LEV | CA RFG. |
| Toyota..... | TOYOT-LDV-97-11-00..... | Camry..... | LDV | LEV | CA RFG. |
| | | Camry..... | LDV | LEV | CA RFG. |

*P=Passenger, C=Cargo.

In order to meet the MY98 purchase requirements, fleet operators must have placed vehicle orders in April, 1997; however, the supply of federally certified CFVs at this time was limited. Based on the limited numbers of light duty vehicles and trucks offered for sale in California in MY1997, and particularly the limited number of LDTs <6000 pounds GVWR, EPA believes that a short delay of the required implementation date of the CFFP for one model year is reasonable to avoid the potential for serious disruption of the initial implementation of this program from an inadequate supply of vehicles. Given the list of current federally certified CFVs, the available choices for passenger cars, pick-up trucks, vans and sport utility vehicles is limited to the following: *20106

List of Certified CFVs Offered for Sale in MY97
[As of April 30, 1997]

| Manufacturer | Certification Number | Models | Type | Standard | Fuel |
|---|---|---|---|---|---|
| **Light Duty** | | | | | |
| IMPCO Tech.. | IMPCO-LDCNGT-97-01..... | Sierra C Pickup..... | LDT | LEV | CNG. |
| Chrysler..... | CHRYSLER-LDCLT-97-00..... | Caravan (2WD), Voyager (2WD)..... | LDCLT | ILEV+ ULEV | CNG. |
| | CHRYS-ZEV-97-01 | Caravan (2WD), Voyager (2WD)..... | LDT | ZEV | Electricity |
| Ford..... | FORD-LDCNGV-97-01..... | Crown Victoria..... | LDV | ILEV+ ULEV | CNG |
| | FORD-LDCNGT-97-01..... | F250(2WD).... | LDT | ILEV+ ULEV | CNG |
| | FORD-LDCNGT-97-02..... | E250(2WD), E350(2WD).... | LDT | ILEV+ ULEV | CNG |
| General Motors..... | GM-ZEV-97-01..... | EV1..... | LDV | ILEV+ ZEV | Electricity |
| | GN-ZEV-LDT-97-01..... | S10 Pickup..... | LDT | ILEV+ ZEV | Electricity |
| Honda..... | HN-ZEV-97-01..... | EV Plus..... | LDV | ILEV+ ZEV | Electricity |

| Manufacturer | Certification Number | Models | Standard | Fuel |
|---|---|---|---|---|
| Cummins..... | CUMMINS-NGE (MHDD)-97-18..... | B5.9-195G..... | LEV | CNG. |
| | CUMMINS-NGE (MHDD)-97-19..... | B5.9-195F..... | LEV | CNG. |
| | CUMMINS-NGE (MHDD)-97-22..... | C8.3-250G..... | LEV | CNG. |
| | CUMMINS-NGE (MHDE)-97-01..... | B5.9-195G..... | ULEV | CNG. |
| Detroit Diesel..... | DDC-NGE (LHDDE)-97-01..... | Series 30G..... | LEV | CNG. |

## SIP Revisions

In light of this action, states with adopted CFFP SIPs may revise their SIPs to provide for a model year 1999 start date for the CFFP purchase requirements. Fleet operators may still earn credits for early purchase of CFVs that meet



all applicable requirements, including the requirement that fleet operators operate their CFVs on clean alternative fuels when in the covered nonattainment area. The EPA believes this action will provide states and fleet owners the necessary flexibility in those areas that are unable to meet the CFF purchase requirements cited in the CAAA.

## Administrative Requirements

A. Administrative Designation

Under Executive Order 12866, (58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is "significant" and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency;

(3) Materially alter the budget impact of entitlement, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, EPA believes that this final action is not a significant regulatory action and therefore not subject to OMB review. Approvals of SIP submittals under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements but simply approve requirements that the State is already imposing. This action simply revises regulations governing the requirements states' CFFP SIP submissions must meet. It serves to delay states' required implementation of CFFP

purchase requirements. Therefore, it has been determined that this action does not constitute a "major" regulation.

B. Reporting and Recordkeeping Requirement

There are no information requirements in this direct final rule which require the approval of the Office of Management and Budget under the Paperwork Reduction Act 44 U.S.C. 3501 et seq.

C. Regulatory Flexibility

EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this final rule. EPA has also determined that this rule will not have significant economic impact on a substantial number of small entities. This is based on the fact that this action does not impose any new requirements, but simply delays the applicable start date of the CFFP purchase requirements that must be included in certain state's SIPs, pursuant to the CAA. Thus, the impact created by the proposed action does not increase the preexisting burden of the existing rules which this proposal seeks to amend.

D. Submission to Congress

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. This rule is not a "major rule" as defined by 5 U.S.C. 804(2). ***20107**

E. Unfunded Mandates Act

Under section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule where



the estimated costs to State, local, or tribal governments, or to the private sector, will be $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objective of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly impacted by the rule. To the extent that the rules being adopted in this action would impose any mandate at all as defined in section 101 of the Unfunded Mandates Act upon the state, local, or tribal governments, or the private sector, as explained above, this rule is not estimated to impose costs in excess of $100 million. EPA has determined that today's action simply delays the purchase requirements under state CFFPs and does not impose additional costs or regulatory burdens. In fact, the one-year delay of implementation of the purchase requirements is expected to reduce costs of compliance and ease regulatory burdens.

**List of Subjects in 40 CFR Part 88**

Environmental protection, Labeling, Motor vehicle pollution, Reporting and recordkeeping requirements.

Dated: April 3, 1998.

**Carol M. Browner,**

Administrator.

For the reasons set out in the preamble, 40 CFR part 88 is amended as follows:

**PART 88—[AMENDED]**

1. The authority citation for part 88 continues to read as follows:

**Authority:** 42 U.S.C. 7410, 7418, 7581, 7582, 7583, 7584, 7586, 7588, 7589, 7601(a).

2. Section 88.308.94 is amended by designating the existing text as paragraph (a) and by adding paragraph (b) to read as follows:

**§88.308.94 Programmatic requirements for clean-fuel fleet vehicles.**

* * * * *

(b) Program start date. The SIP revision shall provide that the clean fuel vehicle purchase requirements begin to apply no later than model year 1999.



[EPA letterhead]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY WASHINGTON, D.C. 20460

OFFICE OF
GENERAL COUNSEL

SEPT. 15 1999

Honorable Thomas F. Reilly
Attorney General
Commonwealth of Massachusetts
200 Portland Street
Boston, MA 02114

Dear Attorney General Reilly:

Thank you for your letter dated January 28, 1999, requesting the Agency's opinion regarding questions raised by the court in *American Automobile Manufacturers Association, et al. v. Massachusetts Department of Environmental Protection*, 163 F.3d 74 (1st Cir. 1998). EPA has reviewed this matter with particular concern for ensuring that states are provided continued flexibility in reducing emissions from automobiles and encouraging innovation in automobile design

As explained more thoroughly in the accompanying document, given the unique facts of this case and the language and intent of the Clean Air Act (the Act), EPA believes that Massachusetts's regulations requiring delivery of Zero Emission Vehicles (ZEVs) in Massachusetts from 1998-2000 are not preempted under the Act. Congress sought to ensure that other states may benefit from steps taken by California to achieve cleaner cars. First, we believe that Massachusetts's ZEV mandate is a standard subject to the identicality restrictions of the Act. That said, given the unique factual circumstances surrounding these MOAs, EPA believes that the provisions of the MOAs

requiring the placement of ZEVs in California should as well be considered standards adopted by California for purposes of section 177 and 209(a). Though the MOAs on their face are non-regulatory contractual agreements, the background for the MOAs indicate that they grew directly out of the ZEV regulatory requirements that were in place for the 1998-2002 model years prior to California removing them and were intended to stand in the place of and perform the function of these regulatory requirements, albeit with certain changes (e.g., the number of vehicles affected). Given these facts, EPA believes that state attempts to duplicate the MOAs in regulations should not be preempted by the Act.

EPA does not believe that voluntary agreements between states and manufacturers are generally preempted under section 209. EPA believes that California plays a very important role in promoting the development and sale of clean automotive technology, and that voluntary nonregulatory agreements are a valid tool to implement this role. Such agreements would not [2] normally be treated as standards for purposes of sections 209 and 177. However, under the unique factual circumstances of this case, EPA believes it is appropriate to consider these specific MOAs as standards adopted by California, which Massachusetts may then adopt under section 177.

Thank you again for your letter. If you have any questions regarding the enclosed response, please call me at (202) 260-8040.

Sincerely,

Gary S. Guzy
General Counsel

Robert Perciasepe
Assistant Administrator
Office of Air and Radiation

cc: Julie Becker, Alliance of Automobile Manufacturers



Kathleen C. Walsh, California Air Resources Board

## [1] OPINION ON ISSUES RAISED BY AAMA v. MASSACHUSETTS DEP

By letter dated January 28, 1999, Mr. Thomas F. Reilly, the Attorney General of Massachusetts, requested the Agency's opinion regarding questions raised by the U.S. Court of Appeals for the First Circuit in the case *American Automobile Manufacturers Assn v. Massachusetts Dept of Environmental Protection*, 163 F.3d 74 (1st Cir. 1998). That case involves a challenge by automobile manufacturers to Massachusetts's zero emission vehicle (ZEV) production requirement for calendar years 1998-2000. Massachusetts's ZEV mandate for model year 2003 and beyond is not at issue. The Court's opinion, dated December 29, 1998, specifically directed Massachusetts to seek the Agency's opinion on these questions. The Court stayed proceedings in the case for 180 days to allow time for the Agency to provide its opinion. On July 7, 1999, the court, pursuant to a request from EPA, stayed further proceedings until September 15, 1999. If EPA does not issue any opinion by that date, the Court said it would decide the issues without EPA guidance.

The letter requests EPA's opinion regarding whether Massachusetts's ZEV production requirement is preempted under the Clean Air Act. The ZEV requirement mandates that the seven largest automobile manufacturers produce for sale specific numbers of ZEVs in the 1998-2000 calendar years. The Court ruled that EPA has primary jurisdiction over the issues,[5] which arise under sections 209 and 177 of the Clean Air Act. The Court also indicated that it expected to give deference to EPA's view on these issues.

EPA believes that, given the text and the underlying goals of the statute and in light of the unique facts of the

[5] Primary jurisdiction is "a doctrine specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency. It requires the court to enable a 'referral' to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling." *Id.* at 81, quoting *Reiter v Cooper*, 507 U.S. 258, 268 113 S. Ct. 1213 (1993).



case, Massachusetts's ZEV requirement should not be preempted. EPA believes that this interpretation ensures that, under similar circumstances, states will be able to implement the emission control standards in effect in California, as contemplated by section 177 of the Act.

### I. Background

#### A. Statutory Provisions

The Clean Air Act generally prevents states from enacting their own emission control programs for new motor vehicles. Section 209(a) of the Clean Air Act (CAA or the Act), 42 U.S.C. § 7543(a), prohibits states from "adopt[ing] or attempt[ing] to enforce any standard relating to the control of emissions from new motor vehicles..." Also, "[n]o State shall require certification, inspection, or any approval related to the control of emissions from any new motor [2] vehicle ... as conditions precedent to the initial sale, titling ... or registration of such motor vehicle..."

There are, however, two exceptions to this general rule. First, when Congress enacted the section 209(a) prohibition in 1967, it recognized that California has special air quality needs justifying a new motor vehicle emission control program more stringent than the federal program, and that California has been the trailblazer in requiring stringent emission controls for motor vehicles. S. Rep. No. 403, 90th Cong., 1st Sess. 33 (1967). Therefore, Congress at the same time enacted section 209(b), which allows California, pursuant to a waiver granted by EPA, to enact its own motor vehicle program, as long as it is at least as stringent, in the aggregate, as the federal program and is technologically feasible given leadtime and cost.

Second, in 1977, Congress enacted CAA section 177, 42 U.S.C. § 7507, which allows other states to enact regulations controlling emissions from new motor vehicles, but only if the state standards are identical to California's standards controlling motor vehicle emissions. This provision allows other states to control emissions from new motor vehicles without requiring motor vehicle manufacturers to comply with a patchwork of different state standards. See *Motor*

*Vehicle Manufacturers Ass'n v. New York;* 17 F. 3d 521, 527-28 (2nd Cir. 1994). Under section 177, as amended in 1990:

> Notwithstanding section 209(a), any State which has plan provisions approved under this part may adopt and enforce for any model year standards relating to control of emissions from new motor vehicles . . . if
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> (1) such standards are identical to the California standards for which a waiver has been granted for such model year, and
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> (2) California and such State adopt such standards at least two years before commencement of such model year .... Nothing in this section or in title II of this Act shall be construed as authorizing any such State to prohibit or limit, directly or indirectly, the manufacture or sale of a new motor vehicle . . . that is certified in California as meeting California standards, or to take any action of any kind to create, or have the effect of creating, a motor vehicle . . . different than a motor vehicle . . . certified in California under California standards (a "third vehicle") or otherwise create such a "third vehicle."

B. Regulatory Background

In 1990, California adopted regulations establishing a Low Emission Vehicle (LEV) program, which requires automobile manufacturers ("manufacturers") to meet progressively more stringent automobile standards beginning in model year 1994. The LEV program provides that manufacturers must build vehicles that meet one of several sets of standards (i.e. "Tier 1 vehicles," Transitional Low Emission Vehicles (TLEVs), Low Emission Vehicles (LEVs), Ultra Low Emission Vehicles (ULEVs) and Zero Emission Vehicles (ZEVs)) and that manufacturers' fleets for each model year must meet a fleetwide non-methane organic gases (NMOG) emission [3] average, which becomes progressively more stringent each year. The LEV program also initially included a provision requiring that, beginning in model year 1998, two percent of all automobiles offered for sale by manufacturers in any model year must be ZEVs. This percentage increased to five percent in model year 2001



and to ten percent in model year 2003. The only vehicles that can meet this requirement using current technology are electric vehicles. In January, 1993, EPA granted California's request for a waiver of preemption under CAA section 209(b) for its LEV program, including the ZEV provisions,

Following California's adoption of its LEV program, New York and Massachusetts adopted state motor vehicle requirements that mirrored the California LEV program, including the ZEV provisions, under CAA section 177. Manufacturers sought judicial review of the New York and Massachusetts requirements, claiming the regulations were preempted under the Clean Air Act. Manufacturers argued, among other things, that the states' adoption of California's ZEV mandate violated: 1) section 177's requirement that state regulations not limit the sale of California vehicles; and 2) section 177's "third vehicle prohibition." In both cases, the courts found that the state programs were not preempted. *American Automobile Manufacturers Assn v. Greenbaum*, No. 93-10799-MA (D. Mass. Oct. 27, 1993),[6] *aff'd* 31 F. 2d 18 (1 st Cir. 1994); *Motor Vehicle Manufacturers Assn v. New York*, 17 F. 3d 521 (2nd Cir. 1994); *Motor Vehicle Manufacturers Assn v. New York*, 79 F. 3d 1298 (2nd Cir. 1996). The Court in the New York case dealt specifically with the manufacturers' claims against New York's ZEV mandate, and found that the New York's ZEV production requirement did not violate the "sales limitation" or "third vehicle" prohibitions of section 177 because New York's ZEV requirement was identical to California's ZEV requirement. *Motor Vehicle Manufacturers Assn v New York*, 17 F. 3d at 536-538. EPA filed amicus briefs defending the New York and Massachusetts programs in these cases.

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[6] The court in the Massachusetts case did not make a final ruling, but denied manufacturers' motion for a preliminary injunction on Counts 1 through 4 of their complaint, which are not directly related to manufacturers' issues regarding the ZEV mandate, based on the "strong showing on the merits" by Massachusetts. *Id*, slip slip op. At 26.

However, in 1997, California deleted the ZEV sales requirement from its regulations for all model years prior to 2003. At approximately the same time, California signed seven Memoranda of Agreement (MOAs) with the largest manufacturers: In the MOAs, the manufacturers agreed to a demonstration program under which manufacturers would place in California substantially fewer numbers of ZEVs from calendar years 1998 to 2000 than were required under the initial regulations. The manufacturers agreed to place a combined total of 750 ZEVs in California in 1998 and a combined total of 1500 ZEVs in California in both 1999 and 2000. No ZEVs were required in calendar years 2001 and 2002. California agreed in the MOAs to provide a certain amount of infrastructure and support to facilitate the use of ZEVs. Manufacturers also agreed to provide LEVs nationwide under the National Low Emission Vehicle (NLEV) program. Manufacturers are subject to potentially severe penalties, through liquidated damages, if they fail to comply with the MOA. For example, a complete failure to implement the [4] MOA could lead to a penalty equal to a manufacturer's pro-rata share of $100,000,000.[7] The determination of whether a breach has occurred is determined initially by the Executive Officer for California's Air Resources Board (CARE), with *de novo* review by the Board, and then *de novo* review in state court. There are no similar provisions for a breach by California. These MOAs were not codified into California's regulations and were not submitted to EPA for a waiver.

Following California's deletion of its ZEV mandate between 1998 and 2002, Massachusetts revised its own ZEV requirements for those years to require that manufacturers deliver in Massachusetts the number of ZEVs each manufacturer agreed to "place" in California under the seven MOAs. Massachusetts also enacted certain reporting

[7] Each manufacturer's pro-rata share, based on historical share of the California market, is defined in the MOAs.



requirements related to placement of ZEVs in Massachusetts.[8]

C. Litigation

AAMA sued Massachusetts in the Federal District Court in Massachusetts, claiming that Massachusetts's ZEV requirement is an emission standard prohibited by CAA section 209(a) and is not permitted by CAA section 177. AAMA claims that the California MOAs are not "standards" as that term is used in sections 177 and 209 of the CAA, but rather contractual agreements. AAMA claims that since Massachusetts's ZEV production requirement is a state standard prohibited under section 209(a) and since it is not identical to any California standard, it is not authorized by, section 177. AAMA also claims that even if the MOAs are standards, California has never asked for or received a waiver for them, so Massachusetts's ZEV mandate is not identical to any California standard for which a waiver had been granted. Finally, AAMA claims that the Massachusetts sales requirement is not identical to the MOAs because it did not contain the reciprocal obligations that California had obliged itself to meet under the MOAs, and Massachusetts had not changed the sales requirements in the MOAs to take account of the smaller number of vehicles sold in Massachusetts compared to California.

Massachusetts claims that its ZEV mandate is not preempted because it is not a "standard" under section 177 but is instead an "enforcement mechanism" related to the LEV standards, which, Massachusetts claims, need not be identical to California standards under section 177. Alternately, Massachusetts claims that if a ZEV mandate is

[8] New York, on the other hand, did not revise its ZEV mandate, continuing to require two percent of manufacturers' vehicles to be ZEVs in the 1998-2000 model years. Manufacturers brought a new challenge to New York's ZEV requirement based on the fact that it was no longer identical to California's requirement and therefore violated section 177. The Second Circuit found that the New York ZEV mandate was preempted. *American Automobile Manufacturers Ass'n v. Cahill*, 152 F. 3d 196 (2nd Cir. 1998) ("Cahill").

a standard, it is a standard whether it is in regulations, as in Massachusetts, or in MOAs, as in California. Thus, California's ZEV [5] requirements would also be standards and Massachusetts's ZEV regulations would be identical to them. Massachusetts claims that its failure to incorporate California's obligations do not render its standards non-identical because the automobile manufacturers' obligations under the MOAs are not dependent on California's obligations. Moreover, Massachusetts claims that California does not need to receive a separate waiver from EPA for the MOAs because they are within the scope of the previous waiver granted to California for its LEV program.

1. The Decision of the District Court

The District Court found that Massachusetts's ZEV mandate was preempted by the CAA, because it "does not adopt a standard identical to California law, or enforce such a standard." *American Automobile Manufacturers Ass'n v. Massachusetts Dept of Environmental Protection*, 998 F. Supp. 10, 18 (D. Mass. 1997) ("*AAMA I*"). The Court found that California's MOAs were not standards because they were voluntary agreements. The Court stated that Massachusetts's mandate violates the "identicality" provision because it "adopts or enforces" a standard in *1998 (i.e.* the production of ZEVs) that California does not require until 2003. Though the Court did not specifically decide whether the ZEV mandate is itself a standard, the court found that the Massachusetts ZEV mandate was preempted. Massachusetts appealed.

2. The Decision of the Court of Appeals

The Court of Appeals for the First Circuit found that many of the issues raised by the case, including the issue of whether the ZEV mandate and the MOAs are "standards," are within EPA's primary jurisdiction and would benefit from EPA's "deep familiarity with the CAA and the public policy considerations that underlie these statutory provisions." *American Automobile Manufacturers Ass'n v. Massachusetts Dept of Environmental Protection*, 163 F.3 d 74, 83 (1st Cir. *1998) ("AAMA II").*



The court further determined that the statutory interpretations of these provisions "lend themselves to competing interpretations . . . and that both are sufficiently reasonable that we would be bound by *Chevron* to defer to the EPA's choice of either one." *Id.*, at *83.*

The court gave Massachusetts 180 days to obtain a ruling from the EPA on these issues, providing a deadline of June 27, 1999. The court said it would decide the issues without EPA's guidance if EPA did not provide its opinion by that date.[9]

D. Administrative Proceedings

On March 26, 1999, EPA published a notice in the Federal Register requesting comment from the public on the letter from the Massachusetts Attorney General. The period for comment [6] ended on April 26, 1999. EPA received detailed comments from Massachusetts and New York supporting Massachusetts's ZEV requirements and detailed comments from California and the Alliance of Automobile Manufacturers/Association of International Automobile Manufacturers against the ZEV requirements. EPA also received several more summary comments from other parties either supporting Massachusetts or the automobile manufacturers.

On June 24, 1999, in a letter from Robert Perciasepe, Assistant Administrator for Air and Radiation to Attorney General Thomas F. Reilly, EPA notified Massachusetts that it was having difficulty meeting the deadline of June 27, 1999 set by the court and anticipated issuing its response by early September. EPA requested that Massachusetts inform the court and inquire whether answering the court's questions in this time frame is acceptable. Massachusetts provided this letter to the court. On July 7, 1999, the court granted the request for additional time, providing EPA until September 15, 1999 to respond to the court's questions.

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[9] As earlier noted, pursuant to EPA request, the court has now extended the deadline to September 15, 1999.

II. Analysis

There is a two-step analysis to determine whether the Massachusetts ZEV mandate is preempted by the Clean Air Act. The first issue is whether the regulation is, as a preliminary matter, prohibited under section 209(a) of the Act. If the regulation would be so prohibited, the next issue is whether the provisions of section 177 nonetheless permit the regulation. With regard to Massachusetts's ZEV mandate, the court answered the first issue and therefore did not refer it to EPA. Thus this document focuses principally on the second issue.

A. Does Section 209(a) Preempt the Massachusetts ZEV Mandate?

The First Circuit ruled that whether the ZEV sales requirement is a standard or an enforcement procedure, it is preempted by section 209(a). This is based on the clear language of section 209(a), which forbids states from "adopt[ing] or attempt[ing] to enforce any standard." Thus, whether the ZEV mandate is itself a standard, as manufacturers claim, or is merely a mechanism for enforcing the other LEV standards, as Massachusetts claims, it is subject to the preemption provisions of section 209(a). *AAMA II* at 83. EPA agrees with the court's reasoning on this issue.

B. Does Section 177 Override Section 209's Preemption as to the Massachusetts ZEV Mandate?

State measures that would otherwise be preempted under section 209 are nevertheless permitted under section 177 if state standards for a particular model year are identical to "California standards for which a waiver has been granted for such model year" and if the standards were adopted at least two years before the model year begins. However, state regulations cannot "limit . . . the manufacture or sale of a new motor vehicle ... that is certified in California" or "have the effect of creating, a motor vehicle ... different than a motor vehicle ... certified in California under California standards (a 'third vehicle') or



otherwise create such a [7] third vehicle." For purposes of this analysis, the key issue regarding Massachusetts's ZEV mandate is whether the mandate is subject to the "identicality" criterion and, if so, whether it meets that criterion.[10]

1. Is the ZEV mandate subject to the identicality provision?

The first question is whether Massachusetts's mandate is subject to the identicality requirements of section 177. Massachusetts argues that the ZEV mandate is not subject to the identicality requirement because the identicality requirement applies only to standards and the ZEV mandate is not a standard, but an enforcement procedure. The manufacturers, on the other hand, argue that the ZEV mandate is a standard, and thus is covered by the identicality requirement. They also argue that the identicality requirement applies in any case to enforcement procedures, but they claim in their comments that EPA need not resolve that issue in this proceeding.

Is the Massachusetts ZEV Mandate a Standard?

i. Comments

Massachusetts argues in its comments that the ZEV mandate is not a standard relating to the control of emissions from new motor vehicles. It claims that the ZEV mandate has only a negligible impact on emissions. The purpose of the mandate is not to reduce emissions directly, but to create the conditions necessary for the implementation of the ZEV mandate in 2003. Massachusetts also states that the ZEV mandate is not a "quantitative standard" and should not be considered an emissions standard, citing *Adamo Wrecking Co. v. US.*, 434 U.S. 275, 285-89 (1978).[11] Massachusetts's comments are echoed by

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[10] The other issues were not raised in the litigation.

[11] The court in that case found that the term "emission standard" under section 112 of the Clean Air Act, as in effect prior to 1977, was

New York. New York claims that the ZEV mandate does not rise to the level of a standard but instead helps enforce compliance with the other standards in the LEV program. New York cites *Motor and Equipment Manufacturers Association v. EPA*, 627 F. 2d 1095 (D.C. Cir. 1979) ("MEMA"). In that case, the D.C. Circuit describes standards as regulations involving "quantitative levels of emissions" and measures that directly address air quality. *Id.*, at 1112-1113. New York claims that the ZEV requirement does not directly address air quality.

Automobile manufacturers argue that the ZEV mandate is a standard. They note that the 2nd Circuit has already found New York's ZEV mandate to be a standard. Further, they claim that the MEMA decision supports their argument because the ZEV mandate does affect emissions, in that it reduces levels of nitrogen oxides (NOx), carbon monoxide (CO), and evaporative [8] hydrocarbons (HCs). The manufacturers state that EPA has previously recognized that the ZEV mandate imposes direct air quality controls that are separate and distinct from the NMOG fleet average. 59 Fed. Reg. at 48,592 (Sept. 22, 1994) (Supplemental Notice of Proposed Rulemaking, Ozone Transport Commission LEV Program).

The manufacturers argue that the most simple standard requires 100% compliance, but a standard is no less a standard merely because it requires only a portion of the fleet to comply. They note that section 202(g) of the Act clearly states that the Tier I "standards" include both the emission levels and the phase-in associated with those levels.

Further, the manufacturers claim that as a practical matter, if state sales requirements need not be identical to California sales requirements, EPA will be giving other states more power than California, because they could then freely decide the number of clean vehicles sold in the state without having to get any approval from EPA regarding

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distinguishable from "design, equipment, work practice or operational standard(s)." *Id.*



stringency or consistency with section 202(a), which are criteria that California must meet under section 209(b). According to the manufacturers, this is contrary to the intent of Congress in enacting section 177, which was to allow states to get needed emission reductions while not causing undue burden on manufacturers, which would occur if each state were allowed to pick its own production requirements. Manufacturers claim that allowing states to adopt their own ZEV mandates could create the "anarchic patchwork" that concerned Congress and the court in *MEMA. Id.*, at 1109.

On this issue, the state of California provided comments similar to those of the manufacturers.

ii. Analysis

EPA believes that the most appropriate interpretation of the language and policy goals of the statute is that Massachusetts's ZEV mandate is a standard for purposes of sections 171 and 209.

The language of the Act contemplates that a standard, for the purposes of sections 177 and 209, would include the requirement to produce a certain number or percentage of vehicles ("production requirement") to meet a numerical emissions limitation. The Clean Air Act does not define the term "standard relating to the control of emissions from new motor vehicles," as found in sections 177 and 209. However, in CAA section 202, which provides EPA's authority for promulgating standards applicable to emissions from motor vehicles, the terms "standard" clearly encompasses both a numerical emission limitation and the number of vehicles that are subject to that limitation. For example, section 202(g), 42 U.S.C. § 7521(g), specifically requires EPA to promulgate "standards" that "provide that emissions from a percentage of each manufacturer's sales volume ... shall comply with the levels specified." Similarly, many current EPA motor vehicle regulations contain phase-in requirements or fleet averages, which EPA has promulgated

[9] under its authority to issue standards under CAA section 202.[12] Part and parcel of the standard-setting authority is the authority to specify the number of vehicles produced by a manufacturer that are subject to particular emission limits. The flexibility to promulgate phase-ins, fleet standards, or a particular "mix" of standards in a particular year is an important aspect of EPA's standard-setting authority. There is little reason to believe that Congress intended a substantially different interpretation of "standard" under section 209 than that under section 202.

A numerical emission limit, by itself has no real meaning absent a tie to the kind and number of motor vehicles to which the limit applies. Setting the link between the emission limit and the applicability of the limit to a particular number of vehicles is an inherent part of the standard setting process. This process specifies the level of emissions or emissions reductions that is expected from a manufacturer and establishes the amount of emissions reductions expected from the standard setting process. If a production requirement, such as the ZEV mandate, is not considered part of the standard itself, then compliance with a standard (i.e., the numerical emission limitation) would be disconnected from the obligation to build cars to meet the standard This could lead to emission standards that have no air quality benefit at all.

This combination of an emissions limit and a requirement to produce vehicles meeting that limit is key to

[12] Percentage production requirements are similar to fleet average emission standards. Such fleetwide standards can easily be converted into percentage requirements, and vice versa. For example, regulations that require 40% of vehicles to meet a 1 gram standard and the rest to meet a 2 gram standard could easily be rewritten as a fleetwide average of 1.6 grams, with two sets of certification standards. EPA has already found that fleetwide average emission standards are "standards." See 62 Fed Reg. 31192, 31222 (June 6, 1997) ("the Agency may promulgate standards, such as fleet averages [and] phase-ins, that are fulfilled through compliance over an entire fleet, or a portion thereof, rather than through compliance by individual vehicles.")



evaluating certain central issues in standard setting. For example, consideration of cost, availability of technology, and resulting emissions reductions all require that both the numerical limit and the applicability of the limit be considered. EPA's obligation to consider these factors in setting emissions standards, and in considering California's requests for waivers from preemption under section 209(b), indicates that the requirement to produce vehicles is in fact part of the emission standard. See sections 202(a), 209(b), 213(a)(3), (4) and (5). For example, under section 209(b), EPA must determine whether California is arbitrary in its determination that its standards are "in the aggregate, at least as protective of public health and welfare as applicable Federal standards." It would be difficult for EPA to make such a determination if it did not review the obligation of manufacturers to build their vehicles, or a portion of their vehicles, to meet California's standards.

Enforcement provisions, by contrast, are designed not to provide a certain level of emission reductions directly, but instead to ensure that the level of emissions reductions expected from the standards actually occur. See *Cahill*, 152 F. 3d at 200. If all requirements considered to be enforcement measures were deleted, and the manufacturers still complied with the [10] requirements considered to be standards, emissions would still be reduced to the levels expected when the standard was set. Since production requirements directly affect the emission reductions from a regulation, rather than ensuring that such reductions occur, they should be seen as an inherent part of motor vehicle emission standards, not enforcement provisions.

The policies underlying section 177 also indicate that the ZEV mandate should be considered a standard, because if production requirements are not standards, then other states could enact production requirements that were different from California's requirements substantially undercutting Congress's intent under section 177 to prevent manufacturers from being required to build different vehicles for various state programs. Section 177 was enacted to allow states to require emission reductions from

new motor vehicles without causing vehicle manufacturers the undue burden of having to meet different standards in different states.[13] California was to be the model for all other states to follow. EPA could be assured that state regulations were technologically feasible and at least as stringent as federal regulations because EPA would have already found California's regulations to meet those requirements under section 209(b).

However, if other states are not limited to the production mandates in California's regulations, this attachment to California's program would be diminished. California would no longer be the model for state programs. Further, EPA's evaluation of California's program under section 209(b) might no longer be relevant for programs enacted by other states. Since such states are not subject to EPA review under section 177 or 209, states would be free to create their own programs without any oversight from EPA. Such states would therefore have substantially more freedom than even California to design their own motor vehicle programs. Manufacturers could be forced to build different numbers or percentages of vehicles to meet the requirements of different states. For example, a state could turn a relatively slow phase-in of a new standard under California's requirements into an immediate requirement for 100% compliance. Because EPA's review of California's motor vehicle program under section 209(b) presumed California's slow phase-in, the other state's revised program with an immediate 100% requirement would have escaped all EPA review, which may lead to the enactment of an infeasible requirement in the other state.

Massachusetts's argument regarding the negligible emissions impact of the ZEV mandate is unpersuasive. The

[13] See, e.g., 123 Cong. Rec. 17,765, 17,766 (June 7, 1977) (Statement of Sen. Anderson regarding section later adopted) ("The language in my amendment... would allow only the present two-car strategy to extend to other States.... No additional certification of different kinds of cars will be required and no new standards will be created.")



small effect on emissions is related only to the number of ZEVs being required not to the issue of whether the mandate is a standard. If a mandate requiring production of a small number of ZEVs is not a standard, it is difficult to see why a mandate for a larger number would be a standard. They are the same type of regulation. In any case, the ZEV mandate would clearly have an impact, however small, on emissions. In particular, emissions [11] from those vehicles specifically subject to the mandate would be substantially affected by the mandate.

In fact, Massachusetts's argument would allow a state to impose the burden on industry that section 177 seeks to avoid, while achieving little or none of the emissions benefits contemplated by section 177. Massachusetts's ZEV mandate requires ZEVs to be delivered for sale in Massachusetts. But for that mandate, manufacturers would not have to produce any ZEV; for sale in Massachusetts from 1998-2000. If the Massachusetts ZEV requirement is different from California's requirement, manufacturers would indeed be subject to different production requirements in different states. This could impose the kind of burden on industry that section 177 was designed to prevent. However, Massachusetts claims that the negligible emissions benefits of the mandate should excuse Massachusetts from the identicality requirement. Yet the purpose of section 177 is to allow states other than California to obtain needed emission reductions from vehicles.

Finding that the Massachusetts ZEV mandate is a standard is also consistent with the view of the Second Circuit, which reviewed virtually the same issue in *Cahill*. In that case, the court ruled that New York's ZEV mandate was an emission standard. The court ruled that standards are "regulatory measures intended to lower the level of auto emissions, while 'enforcement mechanisms' describe regulatory devices intended to ensure standards are effective. ... [T]he ZEV sales requirement must be considered a standard `relating to the control of emissions.' ZEV, after all, stands for 'zero-emission vehicle,' and a requirement that a particular percentage of vehicle sales be

ZEVs has no purpose other than to effect a general reduction in emissions." *Id.* at 200.[14]

EPA therefore believes that the Massachusetts ZEV mandate is a standard for purposes of sections 177 and 209 and is subject to the "identicality provision" in section 177.[15]

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[14] The two cases cited by Massachusetts and New York are not helpfulto them. The *MEMA* case concerned an in-use compliance provision that clearly was an enforcement treasure. The opinion contains dicta that are helpful to either argument. Even assuming the *Adamo* case was ever relevant to the determination of standard under Title II (as the *MEMA* court suggests, 627 F.2d at 1112 n.35, the word "standard" as used in Title 11 is distinguishable from its use in the rest of the Act), it is no longer because Congress has legislatively overruled *Adamo* twice, increasing the scope of the term "emission standard" under section 112, and the rest of the Act, to include the work practice requirements disallowed in *Adamo*. Compare section 302(k), 42 U.S.C. §7602(k) as revised in 1990, to the same section prior to 1990. See also CAA section 112(e)(5), 42 U.S.C. § 7412(e)(5), as in effect prior to 1990, which was enacted in 1979 as a direct response to *Adamo*, 92 Stat. 3443, 3457.

[15] The manufacturers also argue that even if the ZEV mandate is not a standard, regulations other than standards are subject to the identicality requirement under section 177. This issue is relevant not only for evaluation of the ZEV production mandate, but for evaluation of Massachusetts's ZEV reporting requirements. In the context of EPA's conclusion with regard to the proper scope of "standards" under sections 177 and 209, EPA disagrees with manufacturers' argument that requirements other than standards are subject to the identicality requirement. In enacting sections 209 and 177, Congress was careful in its use of the terms "standards" and "accompanying enforcement procedures." See *MEMA*, 627 F. 2d at 1113. Within section 209, subsections (a), (b)(1)(C) and (e)(2)(B) all specifically differentiate between standards and other types of requirements, which would be unnecessary if standards were meant to include other types of requirements. It is clear that Congress understood the difference between these terms when it promulgated provision applies on its face only to standards is strong evidence that requirements other than standards are not covered by that requirement. The Second Circuit reached this conclusion in *Motor Vehicle Manufacturers Ass'n v. New York*; 79 F. 3d 1298, 1305-06 (2nd Cir. 1996). The history of section 177 also supports this analysis. In 1990, Congress revised section 177 to prevent states from taking any action to create a "third vehicle." As the Second Circuit recognized in *Motor Vehicle Manufacturers Assn v New York*, 17 F. 3d 521, 537 (2nd Cir. 1994), a clear purpose of this "third vehicle" prohibition was to prevent states from administering and enforcing standards in such a manner as to effectively require a third vehicle. If the identicality requirement applied to enforcement procedures, the "third vehicle prohibition" would be unnecessary, as identical enforcement procedures could never create a third vehicle. Moreover, the legislative history of this 1990 amendment makes clear that Congress intended states to retain their ability to enforce California's standards through regulations that need not meet the identicality requirements of section 177. Statement of Sen. Baucus, 136 Cong. Rec. S16976 (Oct. 27, 1990) (noting that Congress reaffirmed the pre-existing EPA position that state enforcement procedures need not be identical to California's). Moreover, as noted by the Second Circuit, "it is understandable that Congress did not limit states in this way -- enforcement techniques will necessarily vary from state to state." *Motor Vehicle Manufacturers Assn v. New York*, 79 F. 3d at 1306.



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2. Is the ZEV mandate identical to a California standard that has received a waiver for the same model years?

(a) Are California's MOAs standards under sections 209 and 177?

*i. Comments*

Massachusetts argues that California's MOAs are regulations in all but name, and thus are standards under section 209(a) regardless of form. According to Massachusetts, the term "standards" can mean regulatory standards or contractual standards. Massachusetts states that the MOAs are one-sided and manufacturers pay a heavy penalty (enforceable liquidated damages) for failure to deliver, which indicates their similarity to regulatory standards. Massachusetts claims that the MOAs are an attempt by auto manufacturers to avoid regulation by states other than California. Massachusetts claims that allowing this type of contractual arrangement would [13] give California unreviewable discretion to decide the scope of other states' programs and urges EPA to close the door on this device to prevent attacks on section 177.

New York echoes Massachusetts's arguments, saying that the MOAs undercut Congress's framework under

section 177 and saying that California has grossly abused its powers.

California and the automobile manufacturers argue that the MOAs are not standards and should not be subject to preemption under section 209. They argue that Clean Air Act section 302(k) defines an emission standard as a "requirement established" by EPA or a state, thus implying unilateral regulatory action, not contractual action. Section 209 speaks of "adopting" a standard, which also implies regulatory action, not contractual action.

California and the manufacturers note that the MOAs are contracts and were not adopted by regulation. They argue that federal preemption of state action generally, and the provisions of section 209 in particular, apply only to regulations, and do not preempt a state's ability to contract. See *Building and Construction Trades Council v. Associated Builders and Contractors of Massachusetts*, 507 U.S. 218, 226-27 (1993) and *American Airlines Inc. v. Wolens*, 513 U.S. 219, 229 (1995). These commenters claim that the case cited by the 1st Circuit, *Wisconsin Dep't of Industry v. Gould*, 475 U.S. 282 (1986) is not on point because the Supreme Court in that case invalidated a state statute, not a contract.

California and the manufacturers further argue that Congress never contemplated that a voluntary agreement between California and a manufacturer could be transformed into a binding commitment unilaterally imposed by another state. Section 209(a) was, they argue, designed to protect manufacturers from being forced into a patchwork of regulations, not to prevent voluntary actions. California and other states have previously entered into settlement agreements and other voluntary agreements similar to the MOAs. According to California and the manufacturers, a decision that California's MOAs are covered by section 209 would preempt such voluntary agreements by all states.

California notes that EPA is not precluded from reviewing California's MOAs under the criteria of section 209(b) if the existence of the MOAs calls California's



[illegible]tiveness finding into question. California also notes that Congress specifically gave it extra powers because of its unique air quality problems and its trailblazing in the automobile emission control arena. California claims that the spurring of technological development is one of its most important functions in the Congressional scheme and will ultimately help the whole country. According to California, the MOAs, which create demonstration programs for advanced technology ZEVs, are consistent with Congress's intent. The limited MOAs are, in California's view, the best way to introduce these ZEVs. The automobile manufacturers claim that they need to focus their development efforts on California projects without having to meet widespread requirements in other states before they are ready for commercial distribution. **[14]**

*ii. Analysis*

Given the unique factual circumstances surrounding these MOAs, EPA believes that the provisions of the MOAs requiring the placement of ZEVs in California should be considered standards adopted by California for purposes of section 177 and 209(a). Though the MOAs on their face are non-regulatory contractual agreements, the background for the MOAs indicate that they grew directly out of the ZEV regulatory requirements that were in place for the 1998-2002 model years prior to California removing them and were intended to stand, in the place of and perform the function of these regulatory requirements, albeit with certain changes (e.g., the number of vehicles affected). Moreover, it appears from the record that the MOAs were developed as contractual agreements, rather than regulatory standards, with an intention from the manufacturers' standpoint to limit the ability of other states to adopt the new provisions, thus effectively negating the will of Congress in enacting section 177.

EPA believes that in general, provisions in voluntary agreements ordinarily should not be considered "standards" subject to section 209(a). The language of the statute appears to indicate that provisions in voluntary agreements

should not generally be considered standards under section 209. The legislative history of section 209 also appears to indicate that the prohibition in section 209 is meant to apply to state mandates (regulations and laws), not voluntary agreements. *See discussion, id.* at 23.

Moreover, if production requirements in voluntary agreements were generally preempted, then every such requirement in agreements in every state would be preempted. For example, any contractual agreement between a state and manufacturers to sell low emission vehicles in the state would be preempted. Since only California could overcome preemption through section 209(b), such agreements by all other states would violate the Clean Air Act, unless the relevant provisions were identical to those made by California. EPA believes it would be an inappropriate interpretation of section 209(a) to treat all such agreements as prohibited. Today's decision is limited to the unique circumstances of this case, and is not intended in any way to extend the scope of section 209 beyond regulatory requirements and the specific kind of circumstances considered here.

Massachusetts, however, does not assert that all types of agreements are *per se* preempted under section 209. Massachusetts instead argues that the California MOAs are really regulations in substance, and therefore are subject to section 209 and contain standards that can be copied by other states. California, on the other hand, emphasizes the "demonstration" aspects of the MOAs, and the fact that many provisions in the MOAs, like California's agreement to facilitate infrastructure, are not elements that would normally appear in state regulations.

EPA believes that the MOAs should be treated as standards adopted by California, based on the circumstances presented in this case. A binding regulatory requirement has in effect been replaced by a binding contractual arrangement. The contractual provisions address the same central issue of ZEV production requirements. In this case, the record indicates that the parties [15] intended these provisions to perform the function and take the place of



regulatory revisions, with the attendant benefits to the parties of such revisions. Absent the more stringent regulatory requirements they replaced, the agreements arguably would not have been entered into. Moreover, just as the mere fact that the Massachusetts program involves only a small number of vehicles is not relevant" to a determination whether that program is a "standard" under the Act, the fact that California asserts that it has created only a technology demonstration program is not relevant to a determination under section 209(a) regarding whether the program creates a standard.

The potentially severe liquidated damages resulting from a manufacturer's failure to comply with the MOAs, the manner in which such liquidated damages are decided (initial determination from the CARE Executive Officer, and *de novo* review by the Board, followed by *de novo* court review) and the lack of similar provisions in case of breach by California, perform the function of assessment of civil penalties for breach of a regulatory requirement. These contractual enforcement provisions provide an assurance to California comparable to the preexisting regulatory requirements. In addition, the MOAs were also entered into with an intention by the manufacturers to limit the ability of other states to adopt the new provisions under section 177. *AAMA II*, Brief for the Appellant, pp. 30-32; Letter from Kathleen Walsh, General Counsel, California Air Resources Board, to Jane Armstrong, Director, EPA Vehicle Programs and Compliance Division, dated May 16, 1997 (Docket No. A-99-08, Document No. II-D-04). These specific MOAs function as, and should be treated for the purposes of sections 209 and 177 as, standards in the nature of revisions to the preexisting regulatory ZEV mandate for the 1998-2002 time frame.

EPA is also concerned that not treating these MOAs as standards could encourage California and manufacturers to implement many regulatory measures using this approach, thereby both preventing other states from implementing such measures and escaping EPA review under section 209. EPA agrees with California that the latter concern is

tempered because California will ultimately need to show that its motor vehicle regulatory program (i.e., those measures that are in California's regulations) is in the aggregate as stringent as federal measures; however, even within that framework, California and manufacturers would have considerable ability to avoid the prescriptions of sections 209 and 177 through voluntary agreements.

Many of the arguments raised by California and the automobile manufacturers relate to the argument that voluntary arrangements are generally not covered by sections 209 and 177. As indicated above, EPA agrees with California and the manufacturers that generally such arrangements would not be covered by those sections. However, the unique circumstances of these MOAs clearly indicate that despite the "form" of the documents as contracts, the measures should be treated as standards adopted by California for the purposes of sections 177 and 209. Moreover, the argument that this result is contrary to the intent of Congress is not persuasive, given that Congress clearly intended that other states should have the right to copy California's motor vehicle standards, which is what Massachusetts intended.

**[16]** Thus, given the facts of this case, for purposes of CAA sections 209 and 177, the MOAs should be considered standards adopted by California. Thus, Massachusetts may use their existence to justify their ZEV standards under section 177.

(b) Are Massachusetts Standards Identical to California's

*i. Comments*

Manufacturers claim that California bound itself to infrastructure changes that are important for introduction of ZEVs. These obligations are not in Massachusetts's regulations. Thus, the manufacturers claim that Massachusetts's regulations are in any case not identical to the MOAs.

Massachusetts states in its brief that the obligations of



California are not "reciprocal" to manufacturers' requirements because the obligations are not dependent upon one another. Also, Massachusetts claims that CARB's obligations are not standards under sections 177 and 209.

*ii. Analysis*

EPA believes that Massachusetts's standards are identical to California's standards. California's commitments under the MOAs are clearly not "standards relating to the control of emissions from new motor vehicles" as that term is used under sections 177 and 209. Nor are they pre-conditions upon which the manufacturers' obligations are dependent. They are merely obligations regarding infrastructure that apply to California, not the manufacturers.

(c) Are the *ZEV*-Related Portions of California's MOAs Covered By a Waiver?

*i. Comments*

Manufacturers argued in their brief that Massachusetts' ZEV mandate is preempted because California has not received, or even requested, a waiver for the ZEV mandate in the MOAs. Manufacturers claim that Massachusetts may not rely on the waiver for California's pre-existing ZEV mandate because California's ZEV mandate for 1998-2002 has been repealed and because Massachusetts' ZEV mandate is "very different" from the original mandate.

Massachusetts argued in its brief that the ZEV mandate in the California MOAs is within the scope of the original waiver granted for California's ZEV mandate. Massachusetts notes that California need not seek a new waiver with respect to modification of standards for which EPA has already granted a waiver if the modifications do not undermine the initial decision of the Agency. Massachusetts claims that the relaxation of the ZEV mandate from the initial waiver to the MOAs does not undermine the finding from the initial waiver that California's programs is "in **[17]** the aggregate, at least as protective of public health and welfare as applicable Federal

standards' because the vast majority of the emissions reductions in the LEV program are accounted for by the NMOG fleet average standards and the bin structure of the regulations, not the ZEV mandate. Massachusetts also notes that the relaxation of the ZEV requirements make compliance easier, thus not implicating the requirement of section 209(b) that California standards be "consistent with section 202(a)." California states, without analysis, its belief that if the ZEV provisions of the MOAs were adopted as standards, they would be within the scope of the previous waiver.

*ii. Analysis*

EPA believes that the ZEV requirements in the MOAs are within the scope of the original waiver granted for California's LEV program in 1993. EPA has long recognized that once the Agency has granted a waiver of preemption for a California regulation, revisions to that regulation may be considered within-the-scope of the initial waiver, and thus not require a new waiver, if the revisions 1) do not undermine California's determination that its standards, in the aggregate, are as protective of human health and welfare as comparable Federal standards; 2) are not inconsistent with section 202(a) of the Act; and 3) raise no new issues affecting the initial waiver.

Massachusetts is correct that the reduction in size of the ZEV mandate from 1998-2002 does not undermine California's "in-the-aggregate" determination. The ZEV mandate was responsible for only a small portion of the emission reductions in the LEV program. The NMOG fleet average, which remains in place, is responsible for the vast majority of emission reductions from the LEV program. EPA has received no information to indicate that the MOA ZEV requirements would violate section 202(a) of the Act, which deal with technological feasibility and lead time. As Massachusetts notes, the fact that the MOA requirement actually reduce significantly the requirement to produce ZEVs in the 1998-2002 time frame, compared to the requirements for which EPA has granted a waiver, indicates



that the requirements of section 202(a) have been met. Nor does the new ZEV requirement raise any new issues affecting the initial waiver, beyond the issues discussed above. EPA will be providing a more detailed discussion of these issues shortly in the context of its response to California's request for a within-the-scope determination of its revisions to its LEV regulations. **[18]**

III. Conclusion

For the reasons provided above, EPA believes that under these unique circumstances, "Massachusetts's ZEV mandate is identical to a standard that California has adopted for model years 1998-2000. It is therefore permitted under CAA sections 209 and 177.[16]

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[16] On August 4, 1999, President Clinton signed Executive Order 13132 on federalism ("EO 13132"). 64 Fed. Reg. 43255 (Aug. 10, 1999). EO 13132 is not effective until November 2, 1999; however, the previous Executive Order on federalism, EO 12612, which is revoked by EO 13132, remains in effect until that date. It is unclear whether this document would be subject to EO 13132 or EO 12612 as a "policy that has federal implications" or an "action limiting the policy discretion of the States." See sections 1(a) and 3(b) of both orders. In any case, EPA has, consistent with section 3(a) of both orders, closely examined the basis for the opinions contained in this document, as provided above. The problems that led Congress to enact sections 209 and 177, in particular, the need to protect interstate commerce by preventing a patchwork of differing state standards while ensuring the ability of states to enact motor vehicle standards more stringent than federal standards, are clearly problems of national significance, appropriate for national activity under section 3(b) of both orders. EPA has also consulted with states, and received comments from several states in the process of issuing this document Section 4(c) of the orders indicates that executive departments and agencies should restrict regulatory preemption of state law to the minimum level necessary to achieve the objectives of the statute. Consistent with section 4(c), the interpretations provided in this document were developed with particular concern for ensuring that preemption of state actions are minimized to the extent possible to achieve the goals of the Clean Air Act.

(15)

No. 02-1343

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

ENGINE MANUFACTURERS ASSOCIATION AND WESTERN STATES PETROLEUM ASSOCIATION,
*Petitioners*,

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, ET AL.,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR RESPONDENTS NATURAL RESOURCES DEFENSE COUNCIL, INC., COALITION FOR CLEAN AIR, INC., COMMUNITIES FOR A BETTER ENVIRONMENT, INC., PLANNING AND CONSERVATION LEAGUE, AND SIERRA CLUB

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## QUESTION PRESENTED

Whether section 209(a) of the Clean Air Act, 42 U.S.C. § 7543(a), preempts state and local clean air regulations that enhance the market for cleaner fleet vehicles, such as urban transit buses, without imposing any production mandates or other obligations on manufacturers.

## RULE 29.6 STATEMENT

The respondents joining this brief are Natural Resources Defense Council, Inc., Coalition For Clean Air, Inc., Communities For A Better Environment, Inc., Planning and Conservation League, and the Sierra Club. Each is a non-profit organization and no parent or publicly held company owns 10% or more of any these organizations.

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## STATUTORY PROVISIONS INVOLVED

Relevant portions of sections 101, 116, 177, 202, 203, 209, and 246 of the Clean Air Act, 42 U.S.C. §§ 7401, 7416, 7507, 7521, 7522, 7543, and 7586, are reprinted in the appendix to the brief filed by respondent South Coast Air Quality Management District. For ease of reference, in this brief we refer to those provisions by their section number in the Clean Air Act.

## INTRODUCTION

The South Coast Air Basin—which includes Los Angeles and Orange Counties as well as parts of San Bernardino and Riverside Counties—"experiences the most serious air quality problems in the nation, primarily due to motor vehicle pollution." Pet. App. 5a. Respondent South Coast Air Quality Management District (the "District") concluded in a 1999 study that about 70% of the carcinogenic risk from air quality in the basin is attributable to "diesel particulate emissions," 20% to "other toxics associated with mobile sources," and about 10% to "stationary sources." J.A. 263. The District adopted the "Fleet Rules" at issue in this case to address the region's serious air quality problems, and in particular, to decrease the cancer and other health risks associated with diesel exhaust and other motor vehicle emissions. By 2010 the Fleet Rules are expected to eliminate at least 1,770 tons of dangerous smog-forming pollution in the South Coast region.[1] The respondents filing this brief—non-profit organizations dedicated to the protection of the environment and public health—intervened in the district

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[1] This number is the sum of the nitrogen oxides (NOx) reduction estimates from the staff reports for all six rules. The table of emissions reductions for Rule 1186.1 is located at volume 30 of the Administrative Record at 8651 (30 AR 8651), Rule 1191 at 25 AR 7450, Rule 1192 at 26 AR 7555, Rule 1193 at 27 AR 7874, Rule 1194 at 30 AR 8922, and Rule 1196 at 33 AR 9810.

court to defend the Fleet Rules, recognizing that they are an essential part of the region's efforts to achieve clean air.

Petitioners Engine Manufacturers Association and Western States Petroleum Association (the "engine manufacturers") claim that the Fleet Rules are preempted by section 209(a) of the Clean Air Act (the "Act"), which provides that states (other than California) and local governments may not adopt or attempt to enforce "standards relating to the control of emissions from new motor vehicles." In making this argument, the engine manufacturers deliberately ignore one of the core functions of the Act, which places the "primary responsibility" for reducing air pollution—whatever the source—in the hands of states and local governments. In fact, states *must* achieve clean air by specified deadlines, or face harsh penalties such as the loss of federal highway funds. That is why Congress preserved, through section 116, the states' historically broad authority to adopt any "standard" and "requirement," subject only to three limited exceptions (including the exception in section 209(a)). The engine manufacturers' theory of this case would render states and local governments powerless to control the dominant source of air pollution, namely, motor vehicles. Congress simply could not have intended to place the enormous responsibility to achieve clean air on the shoulders of states and their local governments, only to tie their hands and prevent them from reaching the main source of pollution.

Moreover, in hopes of redefining section 209(a) so that its otherwise limited preemption applies here, the engine manufacturers and the United States craft an overly broad definition of preempted "standards." They base their characterization of "standards" on various dictionary definitions that would require this Court to completely rewrite the motor vehicle provisions of the Act, including broadening the meaning of federal motor vehicle "standards" set forth in section 202; eliminating the Act's distinction between



"standards" and "requirements" in sections 209(e), 246, and 116; and deleting section 246's otherwise inconsistent mandate that states with unhealthful air quality adopt fleet purchase requirements.

Further, the engine manufacturers' overly expansive reading of "standards" in section 209(a) to include fleet *purchase* requirements simply because they "relat[e] to the control of emissions from new motor vehicles" would by necessity sweep *purchase* incentive programs into section 209(a)'s preemptive reach because these also "relat[e] to the control of emissions from new motor vehicles." States and local governments have long relied upon these incentive programs to control air pollution within their borders. While the United States recognizes that section 209(a) was never intended to preempt these critical incentive programs, it fails to distinguish them from the Fleet Rules.

The simple fact is that the only way to avoid rewriting the motor vehicle provisions of the Act is to interpret "standards" as the term is used elsewhere in these same provisions—as numeric *production* mandates imposed on manufacturers. Such an interpretation would necessarily exclude the Fleet Rules from the meaning of preempted "standards" in section 209(a), and is consistent with the central purpose of the Act to achieve clean air as expeditiously as possible. Further, an interpretation that saves the Fleet Rules from preemption would not undermine Congress's sole purpose in adopting section 209(a)—to protect manufacturers from having to *produce* new vehicles to meet emissions standards different from those adopted by California and the federal government. The Fleet Rules do no such thing, but instead merely require purchasers to choose the cleanest vehicles from among those already produced and certified for sale in California.

As the district court below correctly held, the Fleet Rules are not preempted "standards" because they "accept as given the existing [California] vehicle standards" and "impose no

new emission requirements on manufacturers whatsoever." Pet. App. 21a. For the same reasons, the court of appeals affirmed the district court's decision on the basis of its "well-reasoned opinion." *Id.* at 2a. The law is clear, and this Court should similarly affirm the decisions below.

## STATEMENT

### I. THE SOUTH COAST AIR BASIN'S "EXTREME" AIR POLLUTION PROBLEM.

The Clean Air Act charges the United States Environmental Protection Agency ("EPA") with the duty to establish National Ambient Air Quality Standards ("NAAQS"), which are the maximum levels of certain pollutants, including ozone (smog) and particulate matter, that are allowable in the ambient air. 42 U.S.C. § 7409. Under the Act, EPA classifies regions in the country as either being in "attainment" or "nonattainment" with the NAAQS. 42 U.S.C. § 7407(d)(1)(A). Under the 1990 Amendments to the Act, regions are further classified as being in "marginal," "moderate," "serious," "severe," or "extreme" nonattainment, according to the severity of their ambient levels of individual pollutants. 42 U.S.C. §§ 7502(a), 7511-7514.

The South Coast Air Basin ("South Coast") is the only region in the United States classified as an "extreme" nonattainment area for ozone, and is classified as a "serious" nonattainment area for particulate matter. 61 Fed. Reg. 10920, 10955 (Mar. 18, 1996); 58 Fed. Reg. 3334, 3337-38 (Jan. 8, 1993). The 1990 Amendments require the South Coast to meet the NAAQS for ozone by November 15, 2010, and for particulate matter by December 31, 2006. 65 Fed. Reg. 6091, 6100 (Feb. 8, 2000); 42 U.S.C. § 7511(a)(1)(Table 1); 42 U.S.C. § 7513(c)(2), (e).

Both ozone and particulate matter pose serious health threats. Ozone is known to contribute to respiratory illness,



decreased lung function, and premature death. J.A. 244-45. Particulate matter is comprised of microscopic particles that can bypass respiratory defense mechanisms and penetrate deep into the respiratory system. J.A. 248. The presence of large quantities of fine particles in the air has been shown to lead to higher mortality rates, greater occurrences and severity of asthma and cardiovascular disease, and a decline in children's lung function. J.A. 248.

The unhealthful air quality in the South Coast is "dominated by motor vehicle pollution." J.A. 80. In fact, "mobile sources are the single most important cause of ozone pollution, the nation's most widespread air pollutant." Waxman, Henry, et al., *Cars, Fuels, And Clean Air: A Review of Title II of the Clean Air Act Amendments of 1990*, 21 Envtl. L. 1947, 1950 (1991). Motor vehicles contribute more than half of the oxides of nitrogen ("NOx") and hydrocarbons found in the ambient air in the South Coast, J.A. 80, which react with sunlight to produce ozone. J.A. 244. Thus, ozone can be controlled effectively only by a strategy to control the NOx and hydrocarbon emissions from motor vehicles. Motor vehicles, especially diesel trucks and buses, are also significant sources of particulate matter. J.A. 256.

In addition, motor vehicles "are the predominant source of cancer causing air pollutants" in the South Coast. J.A. 256. A comprehensive study completed by the District in 1999—the Multiple Air Toxics Exposure Study ("MATES II")—showed that an overwhelming 70% of all cancer risk from air pollution comes solely from diesel particulate emissions. J.A. 263. That study followed the 1998 listing by the California Air Resources Board ("CARB") of diesel exhaust particulate as a "toxic air contaminant" under the California Health & Safety Code. *See* Cal. Code of Regs. tit. 17, § 93000 (2003). CARB listed diesel exhaust based on an exhaustive review of the scientific literature, including more than two dozen studies that showed that exposure to diesel exhaust increases

the risk of developing lung cancer and other non-cancer adverse health effects. 99-30 Cal. Reg. L. Bull. 383 (Jul. 23, 1999), *available at* 99-30 CRLB 383 (Lexis 1999). EPA has similarly found that long-term exposure to diesel exhaust poses a lung cancer hazard. EPA, Health Assessment Document For Diesel Engine Exhaust (May 1, 2002), *available at* http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=29060.

It was in response to the alarming findings in the MATES II and other cancer studies, combined with the recognition that motor vehicles are the dominant source of smog and particulate pollution, that the District developed the six Fleet Rules at issue in this case.

## II. THE PRIMARY ROLE OF STATES AND LOCAL GOVERNMENTS IN PREVENTING AND CONTROLLING AIR POLLUTION.

Congress enacted the Clean Air Act in 1963 to address the rapidly increasing levels of harmful air pollution throughout the United States. In section 101(b)(1), Congress declared that the central purpose of the Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."

When Congress first enacted the Act, it granted only limited powers to federal authorities, allowing them to intervene to abate interstate pollution in specified circumstances. *Train v. NRDC*, 421 U.S. 60, 63-64 (1975); Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392. Later amendments in 1965, 1967, 1970, 1977, and 1990 broadened the role of the federal government in the control of motor vehicle emissions but continued to place the principal responsibility for reducing air pollution on states and local governments. As Congress made clear in section 101(a)(3):

> [A]ir pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments.



*See also Train*, 421 U.S. at 64; *Union Elec. Co. v. EPA*, 427 U.S. 246, 256 (1976).

The primary role of states under the Act is consistent with the dominant role the states played in regulating air pollution prior to Congress's adoption of the Act in 1963. By 1963, forty states had adopted some form of air pollution control legislation. U.S. Dep't of Health, Education, & Welfare, A Digest of State Air Pollution Laws (Public Health Serv. 1963). While California was the first state to regulate motor vehicle emissions, starting in 1957, *Motor & Equip. Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1109 n.26 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 952 (1980), by 1963 California was among seven states and the District of Columbia that had adopted legislation specifically addressing motor vehicle emissions. *See* U.S. Dep't of Health, Education, & Welfare, *supra*, at 11-19 (California), 39 (Colorado), 46 (District of Colombia), 92 (Indiana), 94 (Kansas), 115 (Michigan), 124 (New Hampshire), 139 (New York).

Congress's intent to leave to states and local governments the lead role in eliminating air pollution is echoed throughout the Act. *See, e.g.*, 42 U.S.C. § 7407(a) ("Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State."); 42 U.S.C. § 7410(a)(1) (requiring states to submit implementation plans containing enforceable measures to attain the NAAQS). Indeed, the Act imposes harsh penalties on states that fail to achieve compliance with the NAAQS by the specified deadlines. *See, e.g.*, 42 U.S.C. § 7509(b)(1) (withholding federal highway funds for all projects in region). As this Court has recognized, the Act thus reflects Congress's "determination to 'tak[e] a stick to the States' in order to guarantee the prompt attainment and maintenance of

specified air quality standards." *Union Elect. Co.*, 427 U.S. at 249 (quoting *Train*, 421 U.S. at 64) (citations omitted).

To insure that states are capable of meeting the NAAQS on time, the Act provides broad authority to states and local governments to control mobile and stationary sources of air pollution. Congress did not, as the engine manufacturers suggest, Pet. Br. 3-4, divide the Act down the middle, limiting states and local governments to the regulation of stationary sources. While the Act contains requirements for state regulation of stationary sources, it also *mandates* that nonattainment areas adopt specified regulations to control mobile sources of pollution. 42 U.S.C. §§ 7511-7514. These additional requirements become increasingly stringent depending on the severity of air pollution in the region. For example, section 182 requires any state containing any part of a "serious" nonattainment area for NOx to adopt an "enhanced vehicle inspection and maintenance program." 42 U.S.C. § 7511a(c)(3). Further, states containing any part of a "severe" nonattainment area for NOx additionally are required to adopt "transportation control strategies . . . to attain reduction in motor vehicle emissions as necessary" to achieve attainment. 42 U.S.C. § 7511a(d)(1)(A).

Moreover, by 1990 Congress recognized that many regions would not meet the NAAQS without more aggressive mobile source measures, such as the use of clean fuels in motor vehicles, leading to enactment of section 246's clean-fuel vehicle mandate. *See* Sen. Comm. On Public Works, 103d Cong., 1st Sess., A Legislative History of the Clean Air Act Amendments of 1990, Serial No. 103-38, at 2572-2573 (1993) (Statement of Rep. Waxman). Section 246 requires states with any part of a serious, severe, or extreme nonattainment area for ozone or a nonattainment area for carbon monoxide to adopt a "clean-fuel vehicle program" mandating the purchase of new motor vehicles by certain fleet operators. *See also* 42 U.S.C. § 7511a(c)(4). Similar to



the Fleet Rules, a state's clean-fuel vehicle program under section 246(b) must "contain provisions requiring that at least a specified percentage of all new covered fleet vehicles . . . shall be clean-fuel vehicles and shall use clean alternative fuels when operating in the covered area." Notably, when Congress enacted section 246, it recognized that the District would be adopting its *own* clean-fuel vehicle fleet rules:

> In the meantime, *California would be proceeding along its own path, perceived at this time as mandating similar fleet requirements* plus diffusion of alternative-fueled passenger cars into the general auto market. California appears to believe that M85 (85% methanol) would be the fuel of choice for the foreseeable future—or at least until 2005.

H.R. Rep. No. 101-490, pt. 1, at 177 (1990) (emphasis added).[2]

Finally, in addition to the numerous mobile and stationary source regulations states and local governments are *required* to adopt, the Act explicitly preserves for states and local governments the broad authority they enjoyed prior to 1963 to control and prevent air pollution within their borders. As section 116 provides:

> [N]othing in [the Act] shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollutants.

This general authority reaffirms the right of states and local governments to adopt regulations that are different from or

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[2] This statement's reference to the development of alternative fuel vehicles running on "methanol" refers to Cal. Health & Safety Code § 40447.5 enacted by the California legislature just three years earlier in 1987. That provision authorized the District to adopt fleet rules requiring the purchase of vehicles that operate on "methanol or equivalently clean burning alternative fuel." *See* Statement, section IV, *infra*.

more stringent than federal regulations. *Union Elec. Co.*, 427 U.S. at 263-64. Contrary to the engine manufacturers' assertion, this general retention of state and local authority is not restricted to stationary sources. Rather, section 116 plainly states that the Act preempts only "*certain* State regulation of moving sources" of pollution (emphasis added). In fact, there are only three exceptions listed in section 116: (1) "standards" relating to new motor vehicles preempted by section 209(a); (2) "standards" respecting aircraft emissions preempted by 42 U.S.C. § 7573; and (3) certain regulation of fuel content preempted by 42 U.S.C. § 7545.

## III. THE ACT'S COMPREHENSIVE SCHEME FOR ESTABLISHING EMISSIONS LIMITATIONS FOR THE PRODUCTION OF NEW MOTOR VEHICLES.

The comprehensive regulatory scheme for the setting and enforcing of new motor vehicle emission "standards" was adopted in 1965, when Congress amended the Act by adding sections 201 *et seq.*—the "motor vehicle provisions." Pub. L. 89-271, 79 Stat. 992 *et seq.* (1965). Section 202 requires EPA to adopt uniform federal "[e]mission standards for new motor vehicles or new motor vehicle engines." Such "standards" under section 202 apply to manufacturers and define the maximum amount (typically expressed in grams) of criteria pollutants that may be emitted from the tailpipe of each newly-produced motor vehicle, based on the vehicle's model year, weight, and horsepower. For example, under section 202(a)(3)(B)(ii), every heavy-duty diesel truck produced for the 1998 and later model years must emit no more than 4 grams per brake horsepower hour ("gbh") of NOx.

Section 203(a)(1) provides for enforcement of these "standards" by prohibiting "the sale, or the offering for sale, or the introduction, or delivery for introduction, into commerce" of a new motor vehicle or engine, unless the



manufacturer first obtains a "certificate of conformity" from EPA. A manufacturer can only receive a certificate of conformity once EPA has tested the vehicle to confirm that it conforms with the applicable emission standard under section 202. 42 U.S.C. § 7525(a)(1). The Act's scheme for the adoption and enforcement of federal emission standards relating to new motor vehicles thus controls the manufacture, but not the purchase, of motor vehicles. In fact, a "new motor vehicle" for purposes of these sections is defined as "a motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser." 42 U.S.C. § 7550(3).

Section 209(a) correspondingly prohibits states and local governments from adopting or enforcing new motor vehicle "standards" that are different from the federal standards, and also prohibits states from requiring their own certification or testing procedures to enforce EPA's standards. Section 209(a) provides:

> No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

Section 209(a) was added in 1967 (as section 208(a)), when section 202 was reenacted without change. Pub. L. 90-148, 81 Stat. 499, 501. Both provisions were part of the National Emissions Standards Act. *Id.*, 81 Stat. 499.

The Act's scheme of requiring EPA to set national standards, and prohibiting states and local governments from adopting their own separate standards, is intended to protect

manufacturers from the "chaotic situation" that would result from having to produce vehicles to comply with 51 different state and federal emission standards. *See* Argument, section II.B.1, *infra* (citing, *e.g.*, S. Rep. No. 90-403, at 33 (1967); H.R. Rep. No. 90-728, at 21 (1967)).

Congress carved out one exception to this general prohibition in 1967 in recognition of California's uniquely serious air quality problem. Section 209(b) allows California to obtain a waiver from EPA to adopt and enforce its own new motor vehicle standards, as long as its "State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards."

In 1977, Congress further broadened state authority to adopt and enforce emission standards for new motor vehicles by adding section 177 to the Act. Section 177 allows states with nonattainment areas to adopt California's stricter emission standards for any model year, as long as the standards are "identical to the California standards for which a waiver has been granted for such a model year." Section 177 thus represents a compromise between the states' need for greater control over motor vehicle pollution to meet the NAAQS and the manufacturers' desire to be free from overly burdensome production mandates. *Motor Vehicle Mfrs. Ass'n v. New York State Dep't of Envtl. Conservation*, 17 F.3d 521, 527 (2d Cir. 1994). In 1990, Congress added a second sentence to section 177, making clear that while states could adopt California's emission standards, they could not enforce those standards through different testing and certification methods in a way that would require manufacturers to create a "third vehicle" to sell in that state. *See* Sen. Comm. On Public Works, 103d Cong., 1st Sess., A Legislative History of the Clean Air Act Amendments of 1990, Serial No. 103-38, at 790 (1993) (exhibit 1 submitted by Sen. Mitchell).

California has exercised its right to adopt motor vehicle standards under section 209(b) multiple times. One such



example is CARB's Low-Emission Vehicle ("LEV") program, which establishes five categories of light- and medium-duty low-emission vehicles, including, in ascending order of stringency, transitional low emission vehicles ("TLEVs"), low emission vehicles ("LEVs"), ultra-low emission vehicles ("ULEVs"), super ultra-low emission vehicles ("SULEVs"), and zero emission vehicles ("ZEVs"). Cal. Code Regs. tit. 13, § 1961(a)(1), (e) (2003). As part of the LEV program, CARB established for each of these five categories numerical emission standards for key criteria pollutants for every class of vehicles (for example, passenger cars). Every vehicle a manufacturer produces and sells must be certified as falling within one of these categories. *See* Cal. Health & Safety Code §§ 43101, 43102 (West 1996). For example, to be certified as a LEV passenger car, a vehicle must emit no more than 3.4 grams per mile (g/mi) of carbon monoxide (CO) and .05 g/mi of NOx. Cal. Code Regs. tit. 13, § 1961(a)(1) (2003). A manufacturer must also ensure that the average emissions from the entire fleet of vehicles it sells do not exceed specified numerical "fleet average" standards for a given year. *See* Cal. Code Regs. tit. 13, § 1961(b)(1) (2003). Manufacturers have the flexibility to choose the mix of vehicles they produce, but as the yearly fleet averages become more stringent, manufacturers are forced to produce increasingly cleaner vehicles.

## IV. THE PURPOSE AND DESIGN OF THE FLEET RULES.

In 1987 the California legislature granted the District the authority to require public and commercial fleets of fifteen or more vehicles operating in the South Coast to purchase vehicles powered by methanol or other "equivalently clean burning" alternative fuel (*e.g.*, natural gas, propane, or electric power). Cal. Health & Safety Code § 40447.5 (West 1996). The legislature enacted section 40447.5 after concluding that the South Coast would fail to meet its then applicable

1987 deadline for achieving the ozone NAAQS unless more aggressive action was taken to control pollution in the region. It stated:

> In recent months, the [District] has come under severe criticism from federal, state and local officials for not taking sufficient actions to control and reduce air pollution. These measures, and others currently pending in the Legislature, are intended to encourage more aggressive improvements in air quality and to give the district authority to implement such improvements.

Cal. Assem. Comm. On Natural Resources, Analysis of Sen. Bill No. 151 (1987-1988 Reg. Sess.) June 29, 1987, p. 4.

In 2000, the District adopted the six Fleet Rules that are the subject of this litigation. The Fleet Rules require tht purchasers operating public, and some private, fleets of fifteen or more covered vehicles buy cleaner vehicles from among those already certified by CARB as meeting California's standards. J.A. 17, 19-20 (1186.1), J.A. 24, 28-29 (1191), J.A. 46, 48-49 (1192), J.A. 52, 54-55 (1193), J.A. 58, 61-63 (1194), J.A. 66, 68-69 (1196). Four of the Fleet Rules require the purchase of only alternative fuel vehicles, J.A. 19-20 (1186.1), J.A. 48-49 (1192), J.A. 54-55 (1193), J.A. 68-69 (1196); two of the rules require fleet operators with certain light- and medium-duty fleets to choose either alternative fuel vehicles or cleaner vehicles certified for sale under California's LEV standards, J.A. 27 (1191), J.A. 61-63 (1194). All six Fleet Rules target vehicle fleets that operate in the South Coast and in close proximity to residential and commercial areas, including transit bus, refuse truck, and street sweeper fleets.

Because alternative fuel vehicles are less polluting than diesel vehicles, the District has estimated that the Fleet Rules will dramatically reduce pollution in the South Coast. Importantly, the Fleet Rules are intended to substantially



reduce particulate matter and the toxic risk faced by residents of the South Coast. *See, e.g.*, J.A. 83, J.A. 111.

Moreover, the Fleet Rules work hand in hand with California's established emission standards, requiring covered fleet operators to purchase vehicles only "as [they are] commercially available." J.A. 120. For example, under Rule 1191, fleet operators are required to purchase ULEVs only "when at least 50 percent of the vehicle sales of light- and medium-duty vehicles . . . are ARB certified as [ULEVs] or cleaner" to ensure commercial availability. J.A. 92, J.A. 27. Every one of the rules contains an exception that allows fleet operators to purchase a diesel or other noncompliant vehicle in the event that no certified compliant vehicle is commercially available for a particular application. J.A. 21 (1186.1(e)), J.A. 30 (1191(f)(8)), J.A. 50 (1192(e)(2)), J.A. 55 (1193(e)(3)), J.A. 63 (1194(e)(2)), J.A. 69 (1196(e)(1)(C)). As such, the Fleet Rules never require manufacturers to produce new motor vehicles. If no manufacturer produces a ULEV medium-duty vehicle or an alternative fuel truck or bus, for example, then no fleet operator is required to purchase one under the Fleet Rules.

## V. THE PURPOSE AND DESIGN OF CLEAN VEHICLE PURCHASE INCENTIVE PROGRAMS.

The Fleet Rules are similar in purpose and effect to economic incentive programs that CARB and other regulators have long utilized in their struggle to attain clean air. Although states and local governments are prohibited under the Act from setting and enforcing "standards" for new motor vehicles, it is common for states to adopt incentive programs to ensure that the cleanest vehicles produced by manufacturers in accordance with already-established standards are purchased and operated within their borders. *See, e.g.*, Cal. Health & Safety Code, §§ 44243-44247, §§ 44275 *et seq.* (West 1996) (California Carl Moyer

Program and South Coast Mobile Source Air Pollution Reduction Review Committee both fund the incremental cost of cleaner vehicles); Ga. Code Ann. § 48-7-40.16 (2003) (Georgia tax credit for the purchase or lease of a zero-emission or low-emission vehicle); Kan. Stat. Ann. § 79-32,2001 (2002) (Kansas tax credit for the purchase of an alternative fuel vehicle); W.Va. Code §§ 11-6D-1—11-6D-8 (2003) (West Virginia tax credit for the purchase of or conversion to an alternative fuel vehicle).

One such example is the "Lower-Emission School Bus Program," which is an incentive program adopted by CARB in 2001 to "reduce [California] school children's exposure to both cancer-causing and smog-forming pollution" and "help in the effort to attain the state and federal [NAAQS] for PM." California Air Resources Board, Lower-Emission School Bus Program, at 3 (2001), *available at* http://www.arb.ca.gov/msprog/schoolbus/finalguide.doc. The program seeks to "introduce cleaner fuels" into school bus fleets by funding a minimum of 75% of the cost of cleaner school buses. *Id.* at 11, 15. Moreover, like Fleet Rules 1191 and 1194, this incentive program references CARB's standards as a convenient method to define which "cleaner" buses are eligible for funding. *Id.* at 13.

## VI. THE DECISIONS BELOW UPHOLDING THE FLEET RULES.

Finding that the Fleet Rules are "purchase" rather than "production" requirements, the district court held that the rules "do not constitute unlawful standards 'relating to the control of emissions'" under section 209(a) of the Act. Pet. App. 24a. As the court explained:

> The Fleet Rules accept as given the existing CARB vehicle standards; they merely require fleet operators to choose from among the least polluting of CARB-certified, available vehicles. The Rules impose no new emission requirements on manufacturers whatsoever, and therefore do not run afoul of Congress's purpose behind motor vehicle preemption: namely, the protection of manufacturers against having to build engines in compliance with a multiplicity of standards.



*Id.* at 21a. The district court further held that the Fleet Rules do not set "standards" under section 209(a) because they do not impose any numerical pollution limits on new motor vehicles. *Id.*

The court also concluded that the clean-fuel vehicle purchase requirements in section 246 support a finding that the Fleet Rules are not preempted, stating: "It is not rational to conclude that the [Act] would authorize purchasing restrictions on the one hand, and prohibit them, as a prohibited adoption of a 'standard,' on the other." *Id.* at 23a. In its analysis the court also applied the presumption against preemption, holding that "[t]hroughout our history the several states have exercised their police powers to protect the health and safety of their citizens." *Id.* at 24a.

The district court dismissed the engine manufacturers' claim that the opt-in provisions of section 177 of the Act preempt the Fleet Rules because that section applies only to "states" wishing to "opt-in" to California's tougher emission standards. Pet. App. 25a. The court further found that the Fleet Rules do not undermine Congress's purpose in enacting section 177 because the rules do not require production of a so-called "third vehicle." *Id.* at 26a.

The court of appeals affirmed the decision of the district court "for the reasons stated in its well-reasoned opinion." Pet. App. 2a.

## SUMMARY OF ARGUMENT

The Fleet Rules are not preempted by section 209(a), which prohibits the adoption or enforcement of "any standard relating to the control of emissions from new motor vehicles," because the Fleet Rules are not such "standards" within the meaning of the Act. "Standards" relating to motor vehicles are production mandates that establish the maximum quantity of a pollutant that may be emitted from the tailpipe of an individual motor vehicle before a manufacturer may introduce that vehicle into the stream of commerce. The Fleet Rules do not establish any such limits. Nor do they impose any obligation on manufacturers.

I. Although section 209(a) does not define the term "standard," Congress plainly meant that term to have the same meaning in section 209(a) (which preempts "state standards") as in section 202 (which requires EPA to adopt uniform federal "emission standards for new motor vehicles or new motor vehicle engines"). Section 209(a) was adopted and section 202 was reenacted contemporaneously as part of the National Emission Standards Act. Title II of Pub. L. 90-148, 81 Stat. 485 *et seq.* (1967). The weakness in the position of the engine manufacturers and the United States is most clearly illustrated by their failure to look to the Act itself to determine what Congress meant by a "standard relating to the control of emissions from new motor vehicles." They instead scour dictionaries in search of an overly broad definition of the term "standard," while ignoring the best guidance concerning Congress's meaning.

Section 202 makes clear that motor vehicle emission "standards" are production mandates that apply solely to manufacturers. In fact, while section 202 repeatedly uses the terms "manufacture," "manufacturer," or "manufactured," the term "purchaser" is not used once. Section 202 further makes clear that "standards" establish numeric limits on individual pollutants that may be emitted from the tailpipe of a new



motor vehicle, which "reflect the greatest degree of emission reduction achievable through the application of technology," section 202(a)(3)(A). For example, one provision in section 202(a)(3)(B)(ii) directs EPA to issue regulations governing NOx emissions from heavy-duty trucks produced after 1997 that "contain standards which provide that such emissions may not exceed 4.0 grams per brake horsepower hour (gbh)." Every other provision in section 202—and there are many—similarly establishes as a "standard" the baseline limit on the amount of a pollutant that may be emitted from the tailpipe of each new vehicle produced, expressed in "grams per brake horsepower hour" or something similar.

Section 203 of the Act further makes clear that the "standards" established in section 202 are prerequisites with which manufacturers must comply before they may introduce a new motor vehicle into commerce anywhere in the United States. Section 203 explicitly prohibits "the sale, or the offering for sale, or the introduction, or delivery for introduction, into commerce" by a manufacturer of a vehicle that fails to comply with the applicable federal standard, but notably, not the purchase of such a vehicle.

Unlike the "standards" established by section 202, the Fleet Rules do not establish or impose on manufacturers numeric production mandates. The Fleet Rules require only that purchasers operating fleets of fifteen or more vehicles buy cleaner vehicles from among those already certified as complying with the relevant emission standards. The Fleet Rules also do not regulate or require the production of motor vehicles, nor must a manufacturer comply with the Fleet Rules before introducing a vehicle into the stream of commerce. To the contrary, none of the Fleet Rules requires a fleet operator to purchase an alternative fuel or other compliant vehicle if one is not already "commercially available" for a particular application. Accordingly, the Fleet Rules do not prevent manufacturers from continuing to

produce any mix of vehicles they choose—the rules merely provide a ready market for cleaner vehicles, and thus, an incentive for individual manufacturers to produce them.

In the parlance of the Act, the Fleet Rules are "requirements" rather than "standards." Three different provisions in the Act draw that distinction—sections 116, 209(e), and 246—and the D.C. Circuit has recognized that Congress clearly distinguished between "standards" and "requirements" in the Act. *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1093 (D.C. Cir. 1996).

Consideration of section 246 confirms that the Fleet Rules are not preempted "standards" under section 209(a). That provision requires specified nonattainment areas to adopt fleet purchase rules for certain vehicles. If Congress had thought that fleet rules would otherwise be preempted by section 209(a), it would have included the phrase "notwithstanding section 209(a)" in section 246—as it did elsewhere in the Act, including in section 177, which authorizes other states to adopt California's emissions standards "notwithstanding section 209(a)." Congress added no such clause to section 246. Rather, as the district court concluded, Congress thought that fleet rules were entirely consistent with the Act—that is why Congress *mandated* the adoption of fleet rules in certain circumstances.

The presumption against preemption also counsels against adoption of the overly broad reading of "standards" advanced by the engine manufacturers. This Court stated in 1960 that "the problem of air pollution is peculiarly a matter of state and local concern." *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 445-46 (1960). Most states had air quality regulations in place before Congress enacted the Act, and many had laws focusing narrowly on pollution caused by motor vehicle emissions. Therefore, this is a field of traditional state concern, and the presumption that Congress



did not intend to preempt applies. That is reinforced by the savings clause in section 116, which makes clear that Congress did not intend to broadly preempt state and local efforts to reduce air pollution.

II. Consideration of the purposes of the Act and section 209(a) further confirms that the Fleet Rules are not "standards." The Clean Air Act, of course, is intended to promote public health by reducing air pollution. Because motor vehicles are the dominant source of smog and cancer risk from air pollution in the South Coast, the Fleet Rules aim to substantially reduce this pollution by bringing cleaner vehicles to the region. Moreover, the Act makes clear in section 101(a)(3) that "air pollution control at its source is the primary responsibility of States and local governments." The South Coast has the worst air quality in the nation and needs aggressive measures such as the Fleet Rules to attain compliance with its looming clean air deadlines. It is undisputed that the Fleet Rules thus advance the purposes of the Act.

The Fleet Rules are in no way inconsistent with Congress's purpose in enacting section 209(a). As the legislative history makes clear, section 209(a) is intended to prevent states from requiring manufacturers to produce "a 'third vehicle'"—that is, a vehicle that must satisfy emission standards different than those established by federal or California rules. The Fleet Rules do not require the production of a "third vehicle." Rather, they only require certain fleet operators to purchase vehicles from among those already certified for sale in California. Like incentive programs promoting the purchase of cleaner vehicles that the United States acknowledges are in compliance with the Act, the Fleet Rules are not preempted.

## ARGUMENT

### I. CONGRESS DID NOT INTEND TO PREEMPT STATE AND LOCAL VEHICLE PURCHASE REQUIREMENTS SUCH AS THE DISTRICT'S FLEET RULES.

This Court has repeatedly emphasized the "cardinal rule" of statutory construction "that a statute is to be read as whole, since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (citation omitted); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole"). "As Judge Learned Hand so eloquently noted: 'Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used.'" *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 25 n.6 (1988) (quoting *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941)).

Although the engine manufacturers suggest otherwise, Pet. Br. 21, this basic tenet of statutory construction applies to an express preemption provision. In *Iowa Dep't of Revenue*, 488 U.S. at 24-25, for example, as part of its analysis of the scope of an express preemption clause, this Court emphasized that "the meaning of the words depends on their context." Similarly, in *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-64 (2002), on which the engine manufacturers rely, this Court considered the statutory context to find that an express clause prohibiting the application of a state or local "law or regulation" did not extend to common law tort claims.

It is particularly important to consider the context in which a term is used where the term at issue "can have more than



one meaning." *See, e.g., Whitman v. American Trucking Ass'n*, 531 U.S. 457, 466 (2001). That is the case here, where the engine manufacturers and the United States proffer broad definitions of the term "standard" culled from selected dictionary definitions and Respondents urge a more precise meaning based on the context of the Act. As we discuss below, examining the term "standards" in the context of the motor vehicle provisions of the Act shows that Congress intended "standards" in section 209(a) to mean numeric production mandates imposed on manufacturers.

#### A. Under The Clean Air Act, A "Standard" Is A Numerical Production Mandate Imposed On Manufacturers.

This Court has held that "[t]he interrelationship and close proximity of . . . provisions of . . . [a] statute 'presents a classic case for application of the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning."'" *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148, 2155 (2003) (quoting *Commissioner v. Lundy*, 516 U.S. 235, 250 (1996)). Section 209 is an integral part of the motor vehicle provisions of the Act, sections 202-209, 214-219, which set forth the Act's comprehensive scheme for the setting and enforcement of uniform, federal emission "standards." How the term "standard" is used in this broader scheme should inform this Court's interpretation of that same term in section 209(a).[3]

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[3] As an initial matter, the plain language of section 209(a), by itself, demonstrates that the term "standards" cannot include *all* regulations "relating to the control of emissions from new motor vehicles," as the engine manufacturers claim, Pet. Br. 23. If "standards" were that broad, then the second sentence of section 209(a) (which the engine manufacturers concede does not apply to the District, Pet. Br. 28) prohibiting a State from adopting certification, inspection, and other such approvals "relating to the control of emissions from any new motor vehicle" would be rendered superfluous.

1. *Section 202 makes clear that a "standard" imposes a numerical tailpipe limit on a manufacturer.* Section 202 of the Act, entitled "[e]mission standards for new motor vehicles or new motor vehicle engines," governs the adoption of federal emission "standards" by EPA. As the court in *American Automobile Mfrs. Ass'n v. Commissioner* found, both the text and the legislative history of the Act confirm that "it is unlikely that Congress intended the term 'standards' to have a different meaning when referring to state standards as compared with federal standards." 998 F.Supp. 10, 22 (D. Mass.), *aff'd*, 208 F.3d 1 (1st Cir. 1997). Further, section 209(b) allows a waiver of the preemption provision for California only if "the state standards will be at least as protective of public health and welfare as applicable federal standards." Clearly Congress intended that state and federal "standards" must refer to the same types of regulations, or this provision would have no meaning.

Emission standards under section 202 are established on a pollutant-by-pollutant basis for each "class" of motor vehicle, as defined by the vehicle's model year, weight, horsepower, or other relevant factors. Such emission standards are different from the purchase requirements of the Fleet Rules in three critical respects.

First, "standards" under section 202 are production mandates that apply solely to manufacturers. Section 202 consistently defines standards as applying to the manufacture of motor vehicles. *See, e.g.*, 42 U.S.C. § 7521(b)(1)(A) ("[R]egulations . . . applicable to emissions of carbon monoxide and hydrocarbons from light-duty vehicles and engines *manufactured* during model years 1977 through 1979 shall contain standards . . . [R]egulations . . . applicable to emissions of hydrocarbons from light-duty vehicles and engines *manufactured* during or after model year 1980 shall contain standards") (emphasis added). Standards apply by "model year," which is defined in section 202(b)(3)(A)(i) as



"the *manufacturer's* annual production period" (emphasis added). Further, the burden of compliance with "standards" falls squarely on manufacturers. For example, section 202(b)(1)(B)(i) allows EPA to impose an alternative standard where "the ability of [a] manufacturer to meet emission standards . . . was, and is, primarily dependent upon technology developed by other manufacturers" and other factors are met.[4] The remaining provisions of section 202 all are aimed at manufacturers. Notably, not one applies to purchasers of new motor vehicles.

Second, the term "standard" is used in section 202 solely in reference to numerical limits on tailpipe emissions. For example, section 202(a)(3)(B)(ii) provides that "[e]ffective for the model year 1998 and thereafter, the [EPA] regulations . . . applicable to emissions of oxides of nitrogen (NOx) from gasoline and diesel-fueled heavy duty trucks shall contain standards which provide that such emissions may not exceed 4.0 grams per brake horsepower hour (gbh)." Similarly, section 202(b)(1)(A) states that the "regulations . . . applicable to emissions of carbon monoxide and hydrocarbons from light-duty vehicles and engines manufactured during model years 1977 through 1979 shall contain standards which provide that such emissions . . . may not exceed 1.5 grams per vehicle mile . . . and 15.0 grams per vehicle mile," respectively. *See also, e.g.*, 42 U.S.C. § 7521(b)(1)(A), (B). Moreover, section 202(b)(1)(C) explicitly refers to the "numerical emission standards specified" in other subsections of 202.

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[4] *See also, e.g.*, 42 U.S.C. § 7521(b)(3) ("[u]pon the petition of any manufacturer" EPA "may waive the standard . . . for any class or category of light-duty vehicles or engines manufactured by such manufacturer"); 42 U.S.C. § 7521(b)(1)(A), (B) ("assuring that vehicles and engines manufactured before the beginning of a model year were not manufactured for the purposes of circumventing the effective date of a standard").

As the D.C. Circuit has correctly concluded, "the word 'standards' connotes a numerical value setting the quantitative level of permitted emissions of pollutants by a new motor vehicle." *Motor & Equip. Mfrs. Ass'n*, 627 F.2d at 1093. In fact, in so holding, the court adopted *EPA's* interpretation of standards as numerical limits on tailpipe emissions. *Id.* The court rejected the industry's argument "that a 'standard' refers to any criterion with which the manufacturers must comply." *Id.* at 1112. The D.C. Circuit also found that the legislative history supported this interpretation: "The Senate Report on the Air Quality Act of 1967 [Clean Air Act], discussing the preemption provision, mentions 'standards' for hydrocarbons, nitrogen oxides, and carbon monoxide in obvious reference to the numerical limitations on those pollutants." *Id.* (citing S. Rep. No. 90-403 at 32 (1967); H.R. Rep. No. 95-294 at 302 (1977)).[5]

The United States relies on section 202(g) to argue that "standards" are not limited to quantitative tailpipe emissions because that section requires EPA to adopt standards that "phase[] in new emissions criteria." U.S. Br. 15 n.3. But the "emissions criteria" referenced in 202(g) unmistakably are numerical tailpipe emission limitations for individual vehicles. Table G in 202(g), entitled "Emission Standards For NMHC [non-methane hydrocarbons], CO [carbon monoxide], and NOx" from light-duty cars and trucks, sets forth these numerical tailpipe emission limitations in grams per mile. Further, section 202(b)(1)(C) explicitly refers to the "numerical emission standards specified in subsection[] . . . (g)." The fact that section 202(g) directs EPA to phase in these new emission standards over three years merely

[5] As the United States notes, U.S. Br. 14, the D.C. Circuit also concluded that section 302(k)'s definition of "emissions standards," 42 U.S.C. § 7602(k), relates only to "stationary sources," *Motor & Equip. Mfrs. Ass'n*, 627 F.2d at 1112 n.35.



reinforces the fact that a "standard" places a production burden on manufacturers.

Third, a "standard" under section 202 sets a *new*, baseline level of emissions that manufacturers must meet, instead of merely referencing existing limits as do the Fleet Rules. In fact, under section 202(a)(2), a standard does not take effect until "after such period as the Administrator finds necessary to permit the development and application of the requisite technology" to meet it.

2. *Sections 203, 206, and 216 confirm that a "standard" establishes a production requirement with which manufacturers must comply before distributing a new motor vehicle.* Together with section 202, sections 203, 206, and 216 establish that the Act's scheme for the setting and enforcing of "emission standards" for "new motor vehicles" places the burden of compliance solely and squarely on *manufacturers*, not purchasers. Initially, a "new motor vehicle" is defined under section 216(3) as "a motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser." 42 U.S.C. § 7550(3). Moreover, section 203(a)(1) of the Act ("prohibited acts") prohibits a manufacturer from "the sale, or the offering for sale, or the introduction, or delivery for introduction, into commerce" of a new motor vehicle unless it is covered by "a certificate of conformity." A manufacturer may receive such a "certificate of conformity" for a new motor vehicle or engine only after EPA tests it to ensure it meets the applicable federal standards set forth in section 202. 42 U.S.C. § 7525(a)(1). Thus, sections 203 and 206 enforce federal "standards" by prohibiting manufacturers from selling any new motor vehicle that does not meet those standards. Notably, neither sections 203 and 206, nor any other section of the motor vehicle provisions of the Act, regulate the *purchase* of new motor vehicles.

3. *In section 209(a), Congress preempted "standards," not "requirements."* As the D.C. Circuit has found, Congress

purposefully distinguished between "standards" and "requirements" in section 209. *Engine Mfrs. Ass'n*, 88 F.3d at 1093. Specifically, while section 209(a) exempts only "standards," section 209(e)—addressing pollution from "nonroad vehicles"—preempts "any *standard or other requirement* relating to the control of emissions" (emphasis added). Likewise, section 246 of the Act—which mandates fleet purchase requirements for certain nonattainment areas—also distinguishes between "standards" and "requirements." Section 246(b) describes the percentage of all new covered fleet vehicles that must be purchased by fleet operators in a given year as the "clean fuel vehicle phase-in *requirements* for fleets" (emphasis added). By contrast, section 246(c) refers to "the *standards* applicable under section 7583" (emphasis added), in obvious reference to the numerical limits on tailpipe emissions that define a "clean-fuel vehicle," such as the light-duty truck "standards" of 3.4 gpm of CO and 0.2 gpm of NOx, 42 U.S.C. § 7583(a)(2).

Similarly, in section 116 Congress separately preserves state and local authority to adopt "(1) any standard or limitation" and "(2) any requirement." Because section 209(a) preempts only "standards" relating to the control of motor vehicle emissions, section 116 preserves the ability of state and local governments to adopt "any requirement" relating to the control of emissions.[6]

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[6] The second sentence of section 209(a) also prohibits a "State" from imposing a narrow list of requirements, including certification, inspection or other similar approvals as a condition precedent to the initial retail sale, titling or registration of a new motor vehicle. The engine manufacturers concede that this provision does not apply to the District, because it applies solely to "States." Pet. Br. 28. But in any event, as the engine manufacturers also correctly state, this provision plainly is intended to prevent states from circumventing the prohibition on "standards" in the first sentence of 209(a) by "designing tests and certification and other approval procedures that would have undermined or changed" the federal



4. *Neither the engine manufacturers nor the United States has articulated a plausible alternative definition of the term "standard."* Both the engine manufacturers and the United States rely on a multitude of generic and mostly irrelevant dictionary and other definitions of the word "standard." The United States, for example, quotes from the Black's Law Dictionary's definition of "standard" as a "measure or rule applicable in legal cases such as the 'standard of care' in tort actions." U.S. Br. 14. The engine manufacturers and the United States make a jump from these definitions to conclude that the meaning of "standard" is so broad that it must encompass purchase requirements. Further, both use words gleaned from these definitions, rather then the words of section 209(a) itself and the motor vehicle provisions of the Act, to make unsubstantiated claims throughout their briefs that the Fleet Rules are preempted because they are based on "emissions characteristics," Pet. Br. 25, or set "emission-related criteria," U.S. Br. 12, "emission control requirements," *id.* at 21, or "regulatory requirements," *id.* at 25.

In so doing, they ignore the well-established jurisprudence of this Court that, where a term has more than one possible meaning, courts must look to the context in which it is found. *See, e.g., Whitman*, 531 U.S. at 466. The United States purports to acknowledge that the meaning of the word "standard" in the Act must "conform[] to the structure and purpose of the provision in which it is used." U.S. Br. 14. Yet inexplicably, it presents only plainly irrelevant uses of the word "standard" in the Act, while conspicuously avoiding the use of "standard" in the context of the *motor vehicle emission provisions* of the Act.

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or California standards. Pet. [illegible]. 29. As discussed below, the Fleet Rules do not contain any such approval procedures, and instead, require the purchase of vehicles already tested and certified by CARB as meeting CARB's standards.

The engine manufacturers and the United States instead primarily focus on words in section 209(a) other than "standards," including "relating to" and "any," in an effort to expand the meaning of the term "standards" unreasonably. First, both mistakenly rely on cases defining the scope of preemption under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a), and the Airline Deregulation Act ("ADA"), *formally at* 49 U.S.C. app. § 1305(a)(1), to claim that the phrase "relating to" in section 209(a) somehow broadens the scope of preemption beyond "standards." But while Congress expressly limited section 209(a) preemption to "standards," the cases cited by the engine manufacturers and the United States involved preemption language under ERISA and the ADA that more expansively prohibit "any and all state laws" and "any law, rule, regulation, standard, or other provision," respectively, that "relate to" the preempted subject matter. *See Egelhoff v. Egelhoff*, 532 U.S. 141, 146 (2001) (ERISA); *California Division of Labor Standards Enforcement v. Dillingham Const., N.A.*, 519 U.S. 316, 335 (1997) (ERISA); *American Airlines v. Wolens*, 513 U.S. 219, 234-35 (1995) (ADA); *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (ERISA); *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 127-28 (1992) (ERISA); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (ADA).[7]

In all but one of the cases cited by the engine manufacturers and the United States, there was no question that the regulation at issue was a "state law" or a "law, rule,

[7] Petitioners also cite to *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25 (1996), which analyzed the McCarran-Ferguson Act's "special . . . anti-preemption provision" providing that "No act of Congress shall be construed to invalidate, impair, or supersede *any law enacted by any State* for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b) (emphasis added).



regulation, standard, or other provision." Only in *Wolens* did this Court focus on whether the asserted claims for breach of contract constituted enactment or enforcement of a "law, rule, regulation, standard, or other provision having the force and effect of law" under the ADA. *Wolens*, 513 U.S. at 226-29. The Court held that these claims were not preempted because they enforced "privately ordered obligations," and thus did not fall within the scope of preemption. *Id.* at 228-29. Notably, because the Court reached this conclusion, it did not consider whether the claims "relat[ed] to . . . rates, routes, or services." *Id.* at 226. The Court's inquiry here similarly should begin and end with the conclusion that the Fleet Rules are not "standards" under section 209(a). The words "relating to" do not expand the scope of preemption beyond "standards"; they merely define what type of "standards" Congress intended to preempt, that is, those "relating to the control of emissions from new motor vehicles."

The engine manufacturers (but not the United States) next misstate the holdings of several cases to claim that the Court has "interpret[ed] Congress's use of the word 'any' to indicate that there was 'no limitation, apart from that of reasonableness,' upon [the] *statute's* applicability." Pet. Br. 24 (emphasis added). As illustrated by the very cases they rely on, however, "any" is a term used solely to qualify what follows. *See United States v. James*, 478 U.S. 597, 604-05 (1986) (Congress's use of the words "any" damages and "liability of any kind" in immunity provision demonstrated that United States was protected from personal, as well as property, damage claims); *Shea v. Vialpando*, 416 U.S. 251, 260 (1974) (where the term "expenses" was unambiguous, the phrase "any expense" could be interpreted as "no limitation, apart from that of reasonableness, may be placed upon the recognition *of expenses*") (emphasis added); *see also Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 586, 588-89 (1980) (the phrase "any other final action" was not limited to

final actions similar to those enumerated in the preceding provisions of the statute, as respondents had argued). Thus, while section 209(a) does indeed preempt "any" standard relating to the control of emissions from new motor vehicles, this Court must first find that the Fleet Rules establish such a "standard." The Fleet Rules do not.

### B. The Fleet Rules Are Not "Standards" Under Section 209(a).

The Fleet Rules do not set "standard[s] relating to the control of emissions from new motor vehicles" as that phrase is used in the motor vehicle provisions of the Act. First, the Fleet Rules do not impose a production mandate—or any obligations—on manufacturers. In California, it is CARB that adopts and enforces new motor vehicle emission "standards" pursuant to its authority under section 209(b) of the Act. Cal. Health & Safety Code § 43804 (West 1996). Manufacturers must comply with CARB's standards, not the Fleet Rules, before they can make a vehicle available for sale in the state. If a manufacturer wishes to sell a passenger vehicle in California and call it a "low-emission vehicle," for example, under CARB's LEV standards, the manufacturer must build that vehicle to emit no more than 3.4 g/mi of CO and .05 g/mi of smog-forming NOx. Cal. Code Regs. tit. 13, § 1961(a)(1) (2003). Moreover, it is the "fleet average" requirements established by CARB—which become increasingly stringent over time—that will require manufacturers to produce a greater number of ULEVs and SULEVs in the future.

By contrast, the purchase requirements of the Fleet Rules are triggered by the commercial availability of CARB-certified motor vehicles. Under Rule 1191, for example, public fleet operators will be required to purchase ULEVs only "when at least 50 percent of the vehicle sales of light- and medium-duty vehicles . . . are ARB certified as [ULEVs]



or cleaner." J.A. 92. In fact, all six Fleet Rules contain an exception that allows a purchaser to buy a diesel (or other noncompliant) vehicle in the event no compliant vehicle is "commercially available" for a particular application. J.A. 21 (1186.1(e)), J.A. 30 (1191(f)(8)), J.A. 50 (1192(e)(2)), J.A. 55 (1193(e)(3)), J.A. 63 (1194(e)(2)), J.A. 69 (1196(e)). As such, the Fleet Rules work in complete harmony with CARB's standards. Manufacturers remain free to produce any mix of vehicles they choose in compliance with CARB's standards, and fleet operators subject to the Fleet Rules are required only to purchase the cleanest vehicles that are commercially available.

Further, as the district court correctly held, the Fleet Rules do not "impos[e] any numerical control on new vehicles" before they are distributed by manufacturers. Pet. App. 21a. Four of the Fleet Rules define cleaner vehicles only by reference to the type of fuel they use (requiring the purchase of vehicles that run on an alternative fuel, such as natural gas), rather than by a numerical emission limitation expressed in grams per brake horsepower hour, or something similar; two of the rules define cleaner vehicles solely by reference to their fuel type or the standards already established and enforced by CARB. *See* Statement, section IV, *supra*. Rule 1194, for example, provides that "all new purchases or leases of passenger cars or medium-duty vehicles used to pick up passengers at commercial airport terminals shall be a vehicle that has been certified by CARB that meets the ULEV, SULEV, or ZEV emission standards." J.A. 61. As such, these rules do not "adopt" or "enforce" any standards, but rather, like many incentive programs, they merely define cleaner vehicles by reference to CARB's established standards.

### C. Section 246 of the Act, Which Mandates Fleet Rules In Certain Circumstances, Further Confirms That "Standards" Under Section 209(a) Do Not Include Fleet Purchase Requirements.

Congress's addition of section 246 to the Act in 1990 further buttresses the conclusion that "standard[s] relating to the control of emissions from new motor vehicles" in section 209(a) do not include clean-fuel vehicle purchase requirements such as the Fleet Rules. Section 246 requires states containing certain nonattainment areas for ozone or carbon monoxide to adopt a "clean-fuel vehicle program," which—like the Fleet Rules—requires certain fleet operators to purchase "clean-fuel vehicles" in specified years. Specifically, a clean-fuel vehicle program under section 246(b) must "contain provisions requiring that at least a specified percentage of all new covered fleet vehicles in model year 1998 and thereafter purchased by each covered fleet operator in each covered area shall be clean-fuel vehicles and shall use clean alternative fuels when operating in the covered area." Similar to the Fleet Rules, fleet operators are free to choose from among available compliant "clean-fuel vehicles" under section 246(d).

The courts below correctly found that Congress's adoption of section 246 makes clear that fleet purchase requirements are not emission "standards" under section 209(a). As the district court explained: "It is not rational to conclude that the [Act] would authorize purchasing restrictions on the one hand, and prohibit them, as a prohibited adoption of a 'standard,' on the other." Pet. App. 23a.

Congress's intention to exclude fleet purchase requirements from the definition of prohibited "standards" under section 209(a) is evident from its failure to provide in section 246 that fleet purchase requirements mandated by that section



are an exception to 209(a) preemption. By contrast, Congress explicitly provided in sections 209(b) and 177 that it was authorizing states to adopt regulations that would otherwise be preempted by section 209(a). In section 209(b), Congress authorized EPA to "waive application of this section" to allow California to adopt its own emission standards. And in section 177, Congress gave other states the right to adopt California's tougher emission standards "notwithstanding section 7543(a) [209(a)] of this title."

Had Congress thought fleet purchase requirements other than those mandated under section 246 were preempted by section 209(a), it would have added the language "notwithstanding section 209(a)" to the beginning of section 246. It did not. The logical conclusion, therefore, is that Congress did not consider clean-fuel vehicle purchase requirements, such as those set out in section 246 and in the Fleet Rules, to be emission "standards" preempted under section 209(a). *See Desert Palace, Inc.*, 123 S. Ct. at 2154 (finding that Congress's failure to define the word "demonstrates" in Title VII to require a heightened burden of proof was significant, as Congress has been "unequivocal" when imposing heightened burdens of proof in other circumstances). In fact, when Congress enacted section 246 in 1990, it recognized that the California Legislature had just three years earlier authorized the District to adopt fleet rules, stating that "California would be proceeding along its own path, perceived at this time as mandating similar fleet requirements." H.R. Rep. No. 101-490, pt. 1, at 177 (1990). Plainly, Congress did not intend to preempt those rules.

The United States argues that Congress's adoption of section 246 shows that it "did not believe that States were already free to regulate emissions from vehicle fleets however they chose." U.S. Br. 26-27. But section 246 does not *authorize* states to adopt fleet rules; it *requires* states to adopt fleet rules in certain specified circumstances. The engine

manufacturers contend that the Fleet Rules are not "saved" by section 246, because the rules do not comply with the requirements of that section. Pet. Br. 42-44. But Respondents have never argued that the District adopted the Fleet Rules pursuant to section 246.[8] Rather, we argue that the Fleet Rules are not preempted "standards" under the Act, and thus, do not need to be "saved" by any other provision.[9]

Section 246 therefore confirms that Congress did not view purchase requirements as "standards" that would be preempted by section 209(a), instead viewing them as entirely consistent with the purposes of the Act. In fact, Congress added section 246 to the Act out of an explicit recognition that many cities would not meet the national ambient air quality standards without adopting aggressive measures, such as requiring the use of clean fuels in motor vehicles. *See* Sen. Comm. On Public Works, 103d Cong., 1st Sess., A Legislative History of the Clean Air Act Amendments of 1990, Serial No. 103-38, at 2572-2573 (1993) (statement of Rep. Waxman). Likewise, the Fleet Rules are an essential component of the District's strategy to address its overwhelming regional air pollution problem.

### D. The Savings Clause And The Presumption Against Preemption Support The Conclusion That The Fleet Rules Are Not Preempted.

The Act's savings clause (section 116) and the general presumption against preemption further confirm that section

[8] There are several differences between section 246 and the Fleet Rules. The most significant difference is that section 246 defines "clean-fuel" vehicles by applying numerical emissions standards, whereas the Fleet Rules define clean fuel vehicles according to the fuel they use.

[9] The engine manufacturers also argue that the Fleet Rules are not saved by section 209(b) or section 177. Pet. Br. 36-42. As with section 246, the engine manufacturers are responding to straw men rather than to arguments made by Respondents.



209(a)'s preemption of "standards" should be read narrowly to preempt only the adoption or enforcement of numeric production mandates placed on manufacturers.

1. In section 116, Congress retained for states and local governments broad authority to prevent and control air pollution. Aside from three very narrowly tailored limitations set forth in section 116—two of which the engine manufacturers agree are not at issue here—Congress provided that "nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution." This savings clause makes clear Congress's intent not to preempt broadly, especially in light of the fact that section 209(a) only preempts "standards," not "requirements." *See, e.g., Sprietsma*, 537 U.S. at 63.

2. In addition, as this Court has consistently held, a preemption analysis starts "with the assumption that the historic police powers of the State were not to be superseded by the Federal Act 'unless that was the clear and manifest purpose of Congress.'" *City of Columbus v. Ours Garage & Wrecker Serv., Inc.* 536 U.S. 424, 438 (2002) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996)). As the parties asserting preemption, the engine manufacturers "bear the considerable burden of overcoming 'the starting presumption that Congress does not intend to supplant state law.'" *De Buono v. NYSA-ILA Med. and Clinical Servs. Fund*, 520 U.S. 806, 814 (1997) (quoting *Travelers Ins. Co.*, 514 U.S. at 654).

Contrary to the engine manufacturers' contention, Pet. Br. 21, the presumption against preemption applies to the question of the scope of preemption under an express preemption provision. *Medtronic Inc.*, 518 U.S. at 485; *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992);

*De Buono*, 520 U.S. at 814; *see also Rush Prudential HMO, Inc., v. Moran*, 536 U.S. 355, 365 (2002) (presumption against preemption helps clarify congressional intent when there is an express preemption provision and a strong savings clause); *Egelhoff v. Egelhoff*, 532 U.S. 141, 151 (2001) (presumption applies to determination of scope of ERISA's express preemption provision).

Further, while it is correct that the presumption against preemption applies only where a field has been traditionally occupied by the states, *United States v. Locke*, 529 U.S. 89, 108 (2000), the field of air quality regulation is precisely such a field. In contrast to the field of national and international maritime commerce considered by this Court in *Locke*, where there was a history of "significant federal presence," *see Locke*, 529 U.S. at 108 ("Congress [] legislated in the field from the earliest days of the Republic"), by the time of adoption of the Act in 1963, forty states had adopted air pollution control regulations. *See* Statement, section II, *supra*. Further, by 1963, seven states and the District of Columbia had adopted legislation specifically addressing motor vehicle emissions. *Id.*

By contrast, Congress granted only limited powers to federal authorities when it first adopted the Act, allowing them to intervene to abate interstate pollution in specified circumstances. *Train v. NRDC*, 421 U.S. at 63-64; Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392. While later amendments broadened the role of the federal government in the control of motor vehicle emissions, Congress continuously has emphasized that the primary responsibility for formulating air pollution control strategies rests with the states. *Train*, 421 U.S. at 64; *Union Elec. Co.*, 427 U.S. at 256. As the Congressional Findings set forth in section 101(a)(3) provide: "air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments."



### E. Section 177 Does Not Expand The Scope Of Preemption Under Section 209(a).

There is no support for the engine manufacturers' argument that in 1990 Congress expanded the scope of preemption under section 209(a) to preempt "indirect" prohibitions on the sale of a new motor vehicle by adding a sentence to section 177 that clarifies that "[n]othing in this section or in subchapter II of this chapter shall be construed as authorizing any such State to prohibit or limit, directly or indirectly, the manufacture or sale of a new motor vehicle." *See* Pet. Br. 30. If Congress intended section 209(a) to preempt every regulation that would even indirectly limit the sale of any new motor vehicle, then it would have stated so explicitly in section 209(a) itself, not in an ancillary provision like section 177. As this Court has said in the context of the Act, "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman*, 531 U.S. at 468.

Further, the legislative history confirms that this 1990 amendment was added as "a mere clarification of current law *and was not intended to provide any preemption of State authority under section 177*." Sen. Comm. on Public Works, 103rd Cong., 1st Sess., A Legislative History of the Clean Air Amendments of 1990, Serial No. 103-38, at 790 (1993) (exhibit 1 submitted by Sen. Mitchell) (emphasis added).

It is clear that Congress had a narrower purpose in mind in adding this language to section 177. The Act recognizes that states could impose stricter standards by procedural rather than substantive means. That is why the second sentence of section 209(a) provides that states may not "require certification, inspection, or any other approval . . . as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle"—so states cannot enforce

prohibited state "standards" through a "backdoor" certification or inspection requirement. The indirect prohibition language in section 177 similarly clarifies that while states may adopt the California emissions standards, they may not enforce the standards through different testing and certification methods in a manner that would require manufacturers to create a "third vehicle" to sell in that state. *See* Sen. Comm. On Public Works, 103d Cong., 1st Sess., A Legislative History of the Clean Air Act Amendments of 1990, Serial No. 103-38, at 790 (1993) (exhibit 1 submitted by Sen. Mitchell) (States must enforce California emission standards "consistent with California protocols and testing [] to assure that the California cars meet California's standards when operated in the opt-in State").

That is precisely why this sentence in section 177 applies only to "any such State," meaning any state choosing to opt in to California's standards. The engine manufacturers' effort to expand the phrase "any such State" to include a "political subdivision" and to use this clause to modify the scope of preemption under section 209(a) should be rejected.

## II. THE FLEET RULES ADVANCE THE PURPOSES OF THE CLEAN AIR ACT AND DO NOT REQUIRE MANUFACTURERS TO PRODUCE A "THIRD VEHICLE."

Because a preemption challenge turns on congressional purpose, as part of its preemption analysis this Court has consistently examined the purpose of the statute in which the preemption provision appears. *See Sprietsma*, 537 U.S. at 70 (finding no preemption where Congress's concern with uniformity in boat manufacturing, reflected by an express preemption provision, was outweighed by the statute's objective of promoting boating safety); *Medtronic, Inc.*, 518 U.S. at 486-90; *Travelers Ins. Co.*, 514 U.S. at 656.



A finding that the Fleet Rules are preempted by section 209(a) would turn the Act on its head by frustrating the ability of states and local air districts to respond effectively to their localized air quality problems, while not furthering the intent of section 209(a) to protect manufacturers from the burden of producing a so-called "third vehicle."

### A. Preempting The Fleet Rules Would Frustrate Congress's Intent That States And Local Governments Reduce Air Pollution.

The purpose of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). To achieve this purpose, Congress repeatedly has made clear in the Act that the "primary responsibility" for reducing air pollution and achieving federal air quality standards rests with States and the local air quality agencies. 42 U.S.C. § 7401 (congressional finding that "air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments"); *see also* Statement, section II, *supra*.

Congress's emphasis on state and local regulation under the Act is a matter of "practical necessity," as "corrective remedies for air pollution . . . necessarily must be considered in the context of localized situations." *Washington v. General Motor Corp.*, 406 U.S. 109, 115-16 (1972). As the Court has explained, "measures which might be adequate to deal with pollution in a city such as San Francisco, might be grossly inadequate in a city such as Phoenix, where geographical and meteorological conditions trap aerosols and particulates." [10]

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[10] The engine manufacturers correctly note that *Washington* contains a general statement that "Congress has largely preempted the field with regard to 'emissions from new motor vehicles.'" Pet. Br. 22. But *Washington* did not concern the scope of section 209(a), and this

*Id.* Congress recognized as early as 1967 that Los Angeles stands alone as having "unique problems" that led to especially severe smog conditions. H.R. Rep. No. 90-728, at 22 (1967); 113 Cong. Rec. 30945-46 (1967).

A finding that the Fleet Rules are preempted would frustrate Congress's clearly expressed purpose by hindering the ability of the District—and other districts and states around the country—to reduce regional pollution and meet federal air quality standards. *See Exxon Mobil Corporation v. EPA*, 217 F.3d 1246, 1255 (9th Cir. 2000) (state requirement for increased oxygen levels in fuel not preempted under Clean Air Act because increased oxygen levels could be needed to meet the NAAQS, a "core purpose of the Act"). It was precisely out of a need to dramatically reduce pollution in the South Coast region that the California legislature in 1987 enacted Cal. Health & Safety Code § 40447.5 (West 1996) authorizing the District to adopt fleet rules. *See* Cal. Assem. Comm. On Natural Resources, Analysis of Sen. Bill No. 151 (1987-1988 Reg. Sess.) June 29, 1987, p. 4. Without the Fleet Rules, the South Coast region was not expected to come into compliance with federal NAAQS for ozone for "several decades." *Id.*

Unfortunately, the region is still in "extreme" nonattainment for ozone, with only seven years remaining before the deadline for attainment of the NAAQS. *See* Statement, section I, *supra*. And the South Coast remains in "serious" nonattainment for particulate matter, with only three years

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statement was merely *dicta*. *Washington*, 406 U.S. at 114. The only issue in *Washington* was whether the Court should exercise its original jurisdiction over a case brought by 18 states against major automobile manufacturers alleging a conspiracy to restrain the development of pollution control equipment. *Id.* at 111. In declining to take jurisdiction, the Court held that air pollution prevention requires local solutions. *Id.* at 116. As such, *Washington* actually supports the decisions of the courts below to apply the presumption against preemption in this case.



remaining under that looming 2006 deadline. *Id.* Given that the majority of air pollution comes from mobile sources, J.A. 80, the engine manufacturers' reading of the Act would render the District powerless to achieve these standards on time, to the detriment of the health of the residents of the South Coast. Moreover, as discussed below, the engine manufacturers' broad reading could preempt a wide range of traditional state and local pollution control programs, such as incentive funding programs, needed by States and local regions to carry out the Act's mandate. These programs generally, and the Fleet Rules in particular, respond to the very serious health problems posed by air pollution.[11]

EPA recently determined that long-term exposure to diesel exhaust poses a lung cancer hazard; the California Air Resources Board listed diesel exhaust particulate as a "toxic air contaminant;" and the District concluded that "70% of all [cancer] risk is attributed to diesel particulate emissions." *See* Statement, section I, *supra*. The Fleet Rules will dramatically lower diesel exhaust emissions in the South Coast region, and the resulting health impacts. There can be no question, therefore, that the Fleet Rules further the extraordinarily important public health purpose at the core of the Clean Air Act.

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[11] The United States suggests to the Court that no harm would befall the District or, presumably, the residents of the South Coast from a holding that the Fleet Rules are preempted, since the State of California can adopt fleet rules pursuant to its authority under section 209(b). U.S. Br. 28-29. But this is far from an adequate "solution." Only California has a right to a waiver under section 209(b)—no other state or local government, including the District, has that option.

### B. Preempting The Fleet Rules Would Not Further The Purpose Of Section 209(a) To Protect Manufacturers From Having To Produce A "Third Vehicle."

1. *Congress's purpose in enacting section 209(a) was to prohibit standards requiring the production of a "third vehicle."* In determining Congress's purpose in enacting a preemption provision, this Court has looked to the legislative history of the provision. *See Ours Garage & Wrecker Serv., Inc.* 536 U.S. at 440-42; *Medtronic, Inc.* 518 U.S. at 490-91. The text and legislative history of the Act makes clear that Congress intended to preempt state emission standards (other than California's) to protect manufacturers from having to produce vehicles to meet multiple emissions standards. As the Senate Report cited by the engine manufacturers, Pet. Br. 4, and the United States, U.S. Br. 19-20, provides: "The auto industry conversely was adamant that the nature of their manufacturing mechanism required a single national standard in order to eliminate undue economic strain on the industry." S. Rep. No. 90-403, at 33 (1967) (emphasis added).

In response to this concern, Congress allowed for only one variation from the federal standard in the form of a waiver for California. The Senate Report provides further: "The industry, confronted with only one potential variation, will be able to minimize economic disruption and therefore provide emissions control systems at lower costs to the people of the Nation." *Id.* While section 177 allows states to adopt the California standards, they must be identical to those standards. As the Conference Report on the 1990 Amendments to the Act states, section 177 thus prevents states "from imposing different emission requirements on new vehicles and engines that would place an undue burden on manufacturers by requiring them to produce materially different new vehicles," the so-called "third vehicle." Sen. Comm. On



Public Works, 103d Cong., 1st Sess., A Legislative History of the Clean Air Act Amendments of 1990, Serial No. 103-38, at 1022 (1993).

Thus, under section 209(a) and the opt-in provision in section 177, manufacturers will have to produce vehicles to meet only two standards—the federal and California standards. While the engine manufacturers cite to the House Report that states that preemption is "necessary in order to prevent a chaotic situation from developing in interstate commerce in new motor vehicles," Pet. Br. 4, *quoting* H.R. Rep. No. 90-728 at 21 (1967), it is precisely the burden of manufacturing a "third vehicle" that Congress had in mind as creating a "chaotic situation."

Contrary to the engine manufacturers' suggestion, the Fleet Rules simply do not require the creation of "third," "fourth," "fifth," and "sixth" vehicles, as they place no production burdens on manufacturers, either directly or indirectly. Pet. Br. 31. Rather, the Fleet Rules only require fleet operators to choose the cleanest vehicles from among those *already produced and certified* for sale. Further, under the Fleet Rules, if no alternative fuel vehicles are certified for sale in California, then the purchaser may purchase a diesel (or other noncompliant) vehicle. *See* Statement, section IV, *supra*. Under no circumstances, therefore, do the Fleet Rules require the production of a "third vehicle."[12]

The real "chaos" that the engine manufacturers seek to avoid is the economic impact on individual manufacturers

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[12] *Amici* AALA contend that the preemption provision was intended to protect "users"—by which they mean fleet operators—from having to purchase cleaner vehicles. AALA Br. 22. But that suggestion is premised entirely on committee reports from 1965—two years before section 209 was adopted, and at a time when the pending bill contained no preemption provision. It is clear that sections 209(a) and 177 protect manufacturers from having to produce a "third vehicle," but do not protect any alleged right of fleet operators to buy dirtier vehicles.

from a loss in market share that the Fleet Rules may cause. Under the Fleet Rules, some manufacturers may face a reduction in their sales in the region (those that sell fewer clean vehicles), while others may see an increase in their sales (those that sell a greater number of clean vehicles). But nowhere in the text or legislative history of section 209(a) did Congress express an intention to protect the market share of an individual manufacturer. Far from it, the fleet purchase requirements established by section 246 demonstrate that Congress assumed that nonattainment areas must limit the market share of manufacturers of dirtier engines in order to achieve clean air.

Because the Fleet Rules do not require the production of a "third vehicle," neither *American Automobile Mfrs. Ass'n v. Cahill*, 152 F.3d 196 (2nd Cir. 1998) ("*Cahill*"), nor *Commissioner*, 208 F.3d 1, supports the engine manufacturers' claim that the Fleet Rules are preempted. Pet. Br. 23, 26. Both *Cahill* and *Commissioner* concerned a state's adoption of standards pursuant to the opt-in provisions of section 177 of the Act. Unlike the Fleet Rules, the state laws at issue would have required the production of a "third vehicle" because the states had opted-into the "zero-emission" vehicle program that California had delayed. *Cahill*, 152 F.3d at 201. As the *Commissioner* court held, "[i]f a *production requirement*, such as the ZEV mandate, is not considered part of the standard itself, then the compliance with a standard . . . would be disconnected from the obligation to build cars to meet the standard." 208 F.3d at 7 (quoting an EPA opinion letter) (emphasis added). Again, the Fleet Rules impose no production mandates whatsoever on manufacturers, and so are not "standards".[13]

[13] Further, neither the *Cahill* nor *Commissioner* courts held that *all* regulations that "effect a general reduction in emissions" are preempted "standards" under section 209(a), as the engine manufacturers imply. Pet. Br. 23 n.3. The *Cahill* court held only that because the ZEV *production* mandate had "no purpose other than to effect a general reduction in emissions," it was a "standard relating to the control of emissions from new motor vehicles" and not an "enforcement procedure." *Cahill*, 152 F.3d at 200; *see also Commissioner*, 208 F.3d. at 7 ("if production requirements are not standards..., then other states could enact production requirements that were different from California's").



2. *Purchase requirements are not production mandates.* The engine manufacturers would have this Court find that "standards" under section 209(a) include fleet purchase requirements because, they claim, section 209(a) prohibits regulations that limit the sale of certified vehicles and "the sale and purchase of a new motor vehicle are two sides of the same coin." Pet. Br. 26. But their basic assumption is wrong—neither section 209(a) nor the motor vehicle provisions of the Act provides manufacturers with a *guarantee* that they will sell every vehicle certified to federal or California standards—even the lowest standards. Rather, as discussed above, section 209(a) protects manufacturers *only* from having to produce a "third vehicle."

As EPA (noticeably absent from the United States' brief) recognized in commenting on section 246, the fundamental difference between emissions standards and purchase requirements is that the former, but not the latter, place such a production requirement on manufacturers:

> [I]n adopting [section 246], Congress made a clear choice between two alternatives: *requiring* manufacturers to produce and sell [clean fuel vehicles] *or creating a market* for [clean fuel vehicles] and for clean alternative fuels by requiring fleet operators to purchase such vehicles and operate on such fuels.

63 Fed. Reg. 20103, 20105 (April 23, 1998) (emphasis added). EPA explained that "Congress intended that the creation of a market for [clean fuel vehicles] would *provide an incentive* for vehicle manufacturers to produce and sell

such vehicles." *Id.* at 20104 (emphasis added). Thus, as EPA acknowledged, while Congress preempted manufacturing mandates requiring the production of a "third vehicle," such mandates are very different from rules requiring fleet operators to purchase cleaner vehicles.

Accordingly, the engine manufacturers' argument that a state or local government could circumvent preemption by "requiring that every vehicle purchased must meet a novel emission standard," Pet. Br. 26, is misplaced. As EPA has made clear, purchase requirements do not mandate the production of vehicles and so are not "standards."[14] Moreover, this argument has no relevance to the Fleet Rules at issue here, which only require the purchase of vehicles that meet the California emission standards, not some "novel" standard adopted by the District.

3. *The Fleet Rules are indistinguishable from the incentive programs the United States acknowledges are not preempted.* The arguments by the engine manufacturers and United States, taken to their logical conclusion, would preempt state and local incentive programs designed to create markets for cleaner vehicles by providing tax incentives or otherwise offsetting the purchase price of a cleaner vehicle. California and the District, like many other state and local governments, have long depended on these vital programs to aid efforts to reduce localized air pollution. It makes no difference, as the United States argues, U.S. Br. 17 n.4, that incentive programs do not impose enforceable requirements in contrast to the

[14] Purchase requirements at most could "indirectly" cause the production of vehicles by creating incentives for manufacturers to produce cleaner vehicles. This Court has held in other contexts that such "indirect" impacts do not support preemption. *See De Buono*, 520 U.S. at 816 (state tax on hospital run by ERISA fund would "have some effect" on the administration of ERISA plans because of increase in cost of providing benefits to employees, but this "indirect" effect is not sufficient to preempt tax).



"requirements" of the Fleet Rules. Neither incentive programs nor fleet purchase requirements would pass the engine manufacturers' proposed test that any program that "references" CARB's or EPA's emissions standards, Pet Br. 27-28, or indirectly limits the sale of a vehicle, Pet. Br. 30, is preempted.

For example, California's Lower-Emission School Bus Program, which is aimed at getting children on cleaner buses by providing 75% of the cost of a new cleaner bus, describes the vehicles eligible for funding by reference to CARB's standards.[15] *See* Statement, section V, *supra*. So do most incentive programs. Likewise, incentive programs indirectly limit the manufacture of dirtier vehicles by creating a market for cleaner ones. This is particularly true of programs like the Lower-Emission School Bus Program, which virtually guarantee the purchase of cleaner vehicles over dirtier ones by covering close to the full cost of the cleaner bus.[16]

[15] California has neither sought, nor received, a waiver under section 209(b) for its incentive programs.

[16] The United States points to Section 249(f)(3), 42 U.S.C. § 7589(f)(3), to suggest that states have limited authority to adopt incentive programs. U.S. Br. at 18 n.5. That is not so. Section 110(a)(2)(A) of the Act, 42 U.S.C. § 7410(a)(2)(A), broadly allows states to adopt "economic incentives." Sections 249(f)(2) and (3) do not purport to limit that authority, but rather, make clear that while states other than California may not require manufacturers to produce "clean-fuel vehicles," they may include clean-fuel incentive programs in a revised state implementation plan. Section 249(f)(2) allows states "to provide incentives for the sale or use" of clean-fuel vehicles, without limitation. And while section 249(f)(3) lists three possible incentive programs, this list is not exclusive – Congress used the words "may include," not "may *only* include." Finally, section 249(f) is not among the preemption provisions listed in Section 116 as exceptions to the broad authority reserved to states and local governments.

In sum, neither purchase requirements like the Fleet Rules nor purchase incentives like the Lower-Emission School Bus Program are preempted. Congress has clearly expressed in the structure and language of the Act that new motor vehicle "standards" control the "production" but not the "purchase" of new motor vehicles. Indeed, since neither the Fleet Rules nor purchase incentive programs have any effect on manufacturers other than providing an *incentive* to produce cleaner vehicles, neither interferes with Congress's main purpose in enacting section 209(a)—to prevent manufacturers from being required to produce vehicles that must comply with 51 different state and federal standards.

## CONCLUSION

The judgment of the courts below should be affirmed.

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No. 02-1343

IN THE

# Supreme Court of the United States

ENGINE MANUFACTURERS ASSOCIATION AND
WESTERN STATES PETROLEUM ASSOCIATION,
*Petitioners,*

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, ET AL.,
*Respondents.*

**On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

## REPLY BRIEF

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December 22, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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## REPLY BRIEF

Section 209(a) of the Clean Air Act ("CAA") expressly preempts state and local "standard[s] relating to the control of emissions from new motor vehicles." 42 U.S.C. § 7543(a). As this Court recognized in *Washington* v. *Gen. Motors Corp.*, 406 U.S. 109, 114 (1972), Section 209(a) preempts broadly. Respondent SCAQMD's ("the District") Fleet Rules are enforceable "standards" that were enacted for the sole and express purpose of controlling emissions from new motor vehicles. They are, in Judge Winter's formulation, "regulatory measures intended to lower the level of auto emissions." *Am. Auto. Mfrs. Ass'n* v. *Cahill* ("*AAMA*"), 152 F.3d 196, 200 (2d Cir. 1998). Under a plain understanding of Section 209(a), the Fleet Rules are preempted.

It is unsurprising, given the applicability of the statute's plain text, that the District ignores this Court's oft-repeated instruction to "begin with the language of the statute." *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). The District derides such a textualist approach as a "labored exegesis," SCAQMD Br. 12, and instead reads numerous limitations into the statute that find no textual support—*viz.*, that the statute preempts only manufacturer-related provisions that are quantitative emissions limits and production requirements. It attempts to bolster this atextual, restrictive reading with various ancillary propositions: an asserted "presumption against preemption," deference to a claimed agency interpretation that deserves none, and numerous tortured interpretations of other provisions of the Clean Air Act. These claims do not affect the conclusion that the Fleet Rules are "standard[s] relating to the control of emissions" as that phrase is commonly understood. In the end, the District's argument has no coherent limiting principle. It would bless numerous State or local statutes—including a complete ban on the purchase or sale of all gasoline-powered vehicles—that would be utterly incompatible with the Act in general, and Section 209(a) in particular.

## I. SECTION 209(a) OF THE CLEAN AIR ACT PLAINLY PREEMPTS THE FLEET RULES.

1. Congress expresses its intent through the plain language of the statute it enacts. *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992). Section 209(a) preempts every "standard relating to the control of emissions from new motor vehicles." 42 U.S.C. § 7543. As an initial matter, there can be no doubt that the Fleet Rules "relat[e] to the control of emissions from new motor vehicles," *id.*, given that their stated purpose is to control vehicle emissions. See Rules 1186.1(a), 1191(a), 1192(a), 1194(a), 1196(a) (JA 16, 24, 52, 58, 66); see also JA141, 146, 151, 155-156.

The District does not seriously contest this point. To be sure, it does offer the counterintuitive assertion that the broad language of "relating to" preemption clauses should be read "narrow[ly]." SCAQMD Br. 17-18. This argument helps the District not at all. Although a "relating to" clause cannot be "'extend[ed] to the furthest stretch of its indeterminacy,'" this Court has repeatedly confirmed that such a "broadly worded provision is 'clearly expansive,'" *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 146 (2001); *Morales* v. *TWA, Inc.*, 504 U.S. 374, 383 (1992) ("the words ['relating to'] ... express a broad pre-emptive purpose"); Chamber of Commerce Br. 10-13.[1]

[1] Unlike ERISA—in which a narrowing construction of "relating to" is arguably warranted because that statute touches so many areas of traditional state regulation, *see DeBuono* v. *NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 815 (1997)—there is no comparable concern in the far more cabined field of mobile source emissions. Whereas more than 2800 ERISA preemption cases had been decided by 1992, *Dist. of Columbia* v. *Greater Wash. Bd. of Trade*, 506 U.S. 125, 135 n.3 (1992) (Stevens, J., dissenting), only a handful of cases have arisen under Section 209(a), and this is the first such case to reach this Court.

Notably, this case is quite unlike those in which "relating to" preemption has been held not to apply. *Cf. id.* at 130 n.1 (no preemption where "the state law has only a tenuous, remote, or peripheral connection with covered plans, as is the case with many laws of general applicability"). By no means can the Fleet Rules, intertwined as they are with the CAA and the CARB program, be termed "laws of general applicability." *Id.*



It is equally plain that the Fleet Rules constitute "standards" as that term is commonly understood and as Congress intended it. The word "standard" is a general, generic term that is most commonly defined as a "criterion" or "test." *Webster's Third New Int'l Dictionary* 2223 (1993) ("something that is established by authority, custom or general consent as a model or example to be followed: criterion, test"); *accord* U.S. Br. 13-15. This Court previously has recognized the near-equivalence of a "standard" and a "criteri[on]." *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 113 (1988). Accordingly, a standard is a requirement or threshold that must be met, and falling short of which results in consequences. Taken as a whole, Section 209(a) preempts any criterion or test adopted by a state or local government that relates by purpose and effect to the control of emissions from new motor vehicles or engines.

The Fleet Rules fall comfortably within this definition. They set criteria for the purchase of new vehicles, and they do so on the basis of those vehicles' emissions characteristics. As explained previously, the Fleet Rules employ the emissions-based vehicle categories that were established in the LEV plan promulgated by the California Air Resources Board ("CARB"), see Pet. Br. 14-17; *id.* at 11-14 (explaining the LEV program), which creates tiers of vehicles based on their quantitative emissions characteristics, see Cal. Code of Regs., tit. 13, §§ 1956.1, 1960.1, 1961. So, for instance, Rule 1191 incorporates CARB standards, and permits the purchase of only LEVs (or vehicles that fall within a more stringent emissions category). See Rule 1191(c)(6), (d)(1), (e) (JA 25, 27, 28). In effect, Rule 1191 encompasses the requirements, among others, that a fleet operator purchase only personal cars (with a durability vehicle basis of 50,000 miles) with maximum NOx emissions of 0.2 grams/mile, maximum CO emissions of 3.4 grams/mile, and maximum NMOG emissions of .075 grams/mile. See CARB, *California Exhaust Emission Standards and Test Procedures for 2001 and Subsequent Model Passenger Cars, Light-Duty Trucks, and Me-*

*dium-Duty Vehicles*, at E-2 (2002), *available at* http://www.arb.ca.gov/msprog/levprog/cleandoc/clean_ldtps_lev2001final.pdf; *accord* Cal. Code of Regs., tit. 13, § 1960.1(g)(1).[2]

Moreover, the Fleet Rules are far more stringent than the LEV program, because they authorize only subsets of the vehicle categories authorized for purchase and sale under that program. The Rules prohibit the purchase of vehicles that are specifically permitted by the California plan (including, notably, various diesel-fueled vehicles, see Pet. Br. 16-17). In short, as the court below recognized, the Fleet Rules permit fleet operators to "acquire only those specific motor vehicles that the [District] has designated as meeting its standards and requirements." Pet. App. 2a, 16a. The conclusion is plain: the Fleet Rules operate as binding, enforceable standards that regulate new motor vehicles, and they do so with the stated purpose and effect of controlling emissions from those vehicles. They are standards that run afoul of Section 209(a).

The case law confirms this interpretation of Section 209(a), and sensibly sets forth just what "standard" means. In *AAMA*, the Second Circuit considered whether a New York requirement—"that sales of zero-emission vehicles ... comprise a certain percentage of new-light-duty-vehicle sales"—constitutes a "standard relating to the control of emissions" for purposes of Section 209(a). 152 F.3d at 197. Like the Fleet Rules, the statute in *AAMA* regulated new vehicle transactions based on their emissions. *Id.* at 200. (And just like the Fleet Rules, the New York statute employed the vehicle emissions categories established by California's LEV program.) The court rightly held that the New York statute constituted a preempted "'standard relating to the control of emissions.'" First, the court defined that phrase, in terms that apply equally here: "regulatory measures intended to lower the level of auto emissions." *Id.* Then, applying that definition, which respondents do not even address, it held the New York statute preempted:

> [T]he ZEV sales requirement must be considered a standard "relating to the control of emissions." ZEV, after all, stands for "zero-emission vehicle," and a requirement that a particular percentage of vehicle sales be ZEVs has no purpose other than to effect a general reduction in emissions.

*Id.*; *accord Ass'n of Int'l Auto. Mfrs.* v. *Commissioner* ("*AIAM*"), 208 F.3d 1, 6 (1st Cir. 2000) (adopting *AAMA*). By contrast to the reasoning below, Judge Winter's rationale for the Second Circuit is clearly faithful to the statutory text and purpose. And it should govern here. The Fleet Rules require the purchase of, for example, Ultra-Low-Emission Vehicles, Super-Ultra-Low-Emission Vehicles, and Zero-Emission Vehicles. In targeting purchase requirements to specified emissions characteristics of new vehicles, the Rules "ha[ve] no purpose other than to effect a general reduction in emissions." *Id.* Accordingly, they are preempted standards.

The District engages in hyperbole when it suggests that petitioners' interpretation of Section 209(a) is "irremediably overbroad." SCAQMD Br. 13. In the first place, 209(a) is

[2] Similarly, the Rules' transparent effort to prohibit diesel vehicles represents a quantitative limit of zero on diesel emissions. *See* Fleet Rules 1186.1(c)(2), 1191(c)(1), 1192(c)(1), 1193(c)(1), 1194(c)(2), 1196(c)(1) (JA 17, 24-25, 47, 52, 59, 66-67). Thus, even if this Court adopted the restrictive interpretation (advocated by the District and *amici*, *e.g.*, SCAQMD Br. 24; Nat'l League of Cities Br. 6-12) that Section 209(a) concerns only quantitative emissions limits, the Fleet Rules easily satisfy that definition. The Rules do not merely reference the LEV program's numerical standards; they incorporate them as part and parcel of the regulatory scheme. The District's purpose all along was for the Rules to serve as the functional equivalent of numerical emissions limits. To that end, the enacting resolution for Rules 1192 and 1196 contemplated the approval of (otherwise-prohibited) conventionally fueled vehicles so long as they achieved a 54% reduction in nitrogen oxide and a 71% reduction in particulate matter. (JA 146, 155.) In focusing on purchasers rather than producers, the Rules are simply a calculated effort to dress up an obviously preempted requirement to look like something else.

self-limiting: it preempts only standards.[3] Moreover, the statute concerns only those standards that relate to the control of emissions from new motor vehicles and engines—that is, that have the purpose and effect of doing so. Here, there can be no question that the express purpose of the Rules was to limit emissions from new motor vehicles. See *supra* at 2. And, moreover, the preemptive scope of Section 209(a) is limited by Section 209(d), which exempts from preemption state and local regulations concerning the "use, operation, or movement" of vehicles. 42 U.S.C. § 7543(d). Finally, the statute contains an escape valve, which allows EPA to approve non-federal standards. *Id.* § 7543(b).

Nor is it the case, as the District asserts, that adopting the plain meaning of "standard" would cause the preemption of incentive programs, "such as the [ones] that condition tax benefits on the purchase of cleaner vehicles." SCAQMD Br. 3, 29-35. There is a clear distinction—namely, voluntariness—between incentive programs and the standards at issue here. Cf. *Am. Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 228-29 (1995) (recognizing, in preemption analysis, the distinction between "'voluntar[y]'" private, and State-imposed legal, obligations). The state and local "standards" condemned by Congress in Section 209(a) are legal prohibitions enforceable by legal sanctions. The emissions-related purchase restrictions embodied in the Fleet Rules fall into this category: Violate them, and penalties follow.[4] By contrast, refuse to buy a hydrogen-powered car, and nothing happens except no

[3] On this score, the District badly misreads petitioners' argument, mistakenly claiming that petitioners believe Section 209(a) preempts "*anything* ... if it refers to or 'is linked in some manner to control of motor vehicle emissions.'" SCAQMD Br. 31 (emphasis added); Nat'l League of Cities Br. 18-19 (same). This is not petitioners' position. Section 209(a) does not preempt *anything*; it preempts *standards*. Thus, as set forth *infra*, a voluntary incentive program that "refers to" motor vehicle emissions does not constitute a standard precisely because it is voluntary.

[4] The Fleet Rules are enforceable by warrantless arrest, fines, and imprisonment. *See* Cal. Health & Safety Code §§ 42400-42410; SCAQMD Rule 105, *available at* http://www.aqmd.gov/rules/html/r105.html.



tax credit is available. 26 U.S.C. § 179A.

This distinction between voluntary and enforceable standards is not contrived; it is rooted in Section 209(a) itself, which prohibits States and localities from "adopt[ing] or attempt[ing] to *enforce* any standard." 42 U.S.C. § 7543(a) (emphasis added). This language presupposes enforceable standards. U.S. Br. 17 n.4. This same distinction is inherent in the subject matter of the statute. As the District concedes, Congress was concerned that manufacturers not have to "comply" with a patchwork of regulation. SCAQMD Br. 2. Of course, "compl[iance]" is meaningless if the standards are merely voluntary.[5] And this same distinction is supported by the text of Section 209(e)(1)—a preemption provision that parallels Section 209(a)—which refers to a "standard or *other* requirement." 42 U.S.C. § 7543(e)(1) (emphasis added). That language reflects Congress's commonsense understanding that a "standard" is one type of "requirement," which itself encompasses notions of enforceability. *Webster's Third New Int'l Dictionary* at 1929 (defining "requirement" as "something called for or demanded"). The District's argument that "incentive programs" would be preempted under the common understanding of "standard" is simply wrong.

2a. The District all but ignores common definitions of the statutory terms. Instead, it seeks to impose an absurdly narrow definition on the term "standard"—recasting it as a "production mandate," *e.g.*, SCAQMD Br. i, 2, 3, 7—that finds no support in the English language. The District hardly tries to identify a definition of "standard" that supports this theory. Instead, it halfheartedly identifies "specifications covering manufacturing material or equipment" as the narrowest definition it could uncover. *Id.* at 19 (quoting *Webster's Third New Int'l Dictionary* at 2223). But this definition is utterly

[5] Likewise, the legislative history speaks repeatedly of Section 209(a) as preempting the States' "right" or "power" to "set standards" regarding emissions. S. Rep. No. 90-403, at 6, 33, 34, 48 (1967); H.R. Rep. No. 90-728 (1967), *reprinted in* 1990 U.S.C.C.A.N. 1938, 1972. "[S]et[ting] standards" simply does not embrace voluntariness.

implausible. "Production mandate" is not covered by "manufacturing material or equipment." No definition of the word "standard" denotes or connotes "production mandates," which is reason enough to reject respondents' interpretation. And, of course, there is no mention of "production mandates" in Section 209(a).

Moreover, defining "standard relating to the control of emissions" as "production mandate" would lead to absurd results. First and foremost, such an interpretation would leave States and localities free to ban completely the sale of various vehicles, because sales bans are not "production mandates." This clearly is not what Congress intended in adopting a federal program to control new vehicle emissions. On the District's rationale, States could not restrict the manner in which a manufacturer *produces* a vehicle—but the State could turn around and prohibit the sale of that same vehicle. Obviously, to forbid the sale of a vehicle is, for all practical purposes, to ban its production.

It is quite clear that restrictions on sales run afoul of Section 209(a). Even the district court (whose opinion, notably, the District makes no effort to defend) recognized this much. Pet. App. 23a. Consider the extreme example: a prohibition against selling any CARB- or EPA-certified vehicle, except the ones favored by the locality (only SULEVs or gas/electric hybrids, for example). The point applies equally to a less onerous regulation—a complete ban on the sale of all vehicles that employ diesel engines (which is not a far cry from what the Fleet Rules do here, see *supra* note 2). As the First and Second Circuits have recognized, a flat ban on the sale of certain vehicles based on their emissions characteristics, "has no purpose other than to effect a general reduction in emissions." *AAMA*, 152 F.3d at 200; *AIAM*, 208 F.3d at 6 (same). As such, this manner of prohibition implicates the core of what Congress preempted in Section 209(a).[6]

[6] Even Professor Currie, whose hostility to preemption the District relies upon, recognized that emissions-based restrictions on vehicle sales are preempted. David P. Currie, *Motor Vehicle Air Pollution: State Authority and Federal Pre-Emption*, 68 Mich. L. Rev. 1083, 1099 (1970) ("adverse consequences may not be attached to selling ... noncomplying vehicles").



There is no principled or practical distinction, for purposes of Section 209(a), between sales restrictions and purchase restrictions. (Nor is there a textual one—the statute preempts "standards," not "production mandates," SCAQMD Br. 2, or "'supply-side' regulations," California Br. 3.) The adoption of widespread, emissions-based purchasing restrictions by States and localities leads to either of two unacceptable outcomes. If the restrictions were similar or identical—an outcome that the District baldly asserts is "highly unlikely," SCAQMD Br. 38—they would be functionally equivalent to a nationwide ban on the sale (and ipso facto, the production) of certain vehicles based solely on their emissions characteristics. Further, if the States and localities made the standard stringent enough, manufacturers would be forced to produce an altogether new vehicle—the "third vehicle" problem that Congress prohibited in Section 177. 42 U.S.C. § 7507. On the other hand, if the District is correct and such regulations turn out to be dissimilar, the result is a patchwork of regulation. One jurisdiction could require natural-gas-powered vehicles; another might require electric vehicles; and a third could mandate super-clean diesel.[7] Vehicles that could be

[7] It is emphatically not the case, as respondents assert, that the Rules have force only when a complying vehicle is already commercially available. SCAQMD Br. 3 (stating that the Rules require the purchase of complying vehicles "if, *and only if*, they are commercially available"); NRDC Br. 45 ("if no alternative fuel vehicles are certified for sale in California, then the purchaser may purchase a diesel (or other noncompliant) vehicle"). To obtain such an exemption, four of the six Fleet Rules require a showing, not only that an approved vehicle is commercially unavailable from any manufacturer, but also that no complying vehicle "could be used" for the relevant purpose. Rules 1192(e)(2), 1193(e)(3), 1194(e)(2), 1196(e)(1)(C) (JA 50, 55, 63, 69-70). Thus, whenever in his discretion the District's Executive Officer determines that some complying yet nonexistent vehicle "could be used" for the given task, there can be no exemption. This is hardly the blanket exemption that SCAQMD claims.

purchased in one county would be forbidden in another. Nothing approaching uniformity in the regulation of new engines and vehicles would survive.

In short, the result would be precisely the "chaotic situation" that Congress sought to prevent. H.R. Rep. No. 90-728, *reprinted in* 1990 U.S.C.C.A.N. 1938, 1956. The District derides this possibility as "extreme," SCAQMD Br. 38, but fails to explain why. And with good reason: A determination by this Court that the District may enact emissions-related purchasing restrictions is an invitation to *every* locality to do the same. That the "165 major metropolitan areas across the United States" represented by *Amici* State and Territorial Air Pollution Program Administrators and Association of Local Air Pollution Control Officers eagerly embrace respondents' arguments, see Nat'l League of Cities Br. 1, is pretty clear evidence that they will accept such an invitation. It is for precisely this reason that preemption analysis requires the consideration of the full range of state and local activities that will result from a determination of no preemption. *E.g.*, *Buckman* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 350 (2001) (considering the possible consequences of "50 States' tort regimes"); *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 161 (1989) (evaluating the "prospect" of action by "all 50 States"); *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 639 (1973) (taking into account the consequences of action by "a significant number of municipalities").[8]

The other Rules likewise condition the receipt of an exemption on requirements in addition to commercial unavailability. Rule 1191 requires a showing that the fleet operator cannot take advantage of a provision awarding emissions credits for the purchase of even lower emissions vehicles. Rule 1191(f)(8) (JA 30). And Rule 1186.1 conditions an exemption on a "Technical Infeasibility Certification," which plainly violates the second sentence of Section 209(a). *See* Rule 1186.1(e) (JA 21-22); *see also* Rule 1196(e) (JA 69-70, 156) (same).

[8] The District's only other response—that Section 209(a) should be read as distinguishing between production standards and purchasing restrictions because Congress has elsewhere adopted purchasing restrictions,



The alternative is clear and eminently workable. Instead of inferring limitations on preemption based on production versus sale versus purchase, this Court should accord the statute its plain meaning. The focus should be on "standards." A "standard relating to the control of emissions" is preempted; a different type of enactment, or one pertaining to a different subject matter, is not. The Fleet Rules implement standards relating to the control of emissions, and are therefore preempted.

b. Unable to identify a definition of the term "standard" that supports its theory, the District instead seeks refuge in the "presumption against preemption." It asserts that the regulation of air pollution falls within the States' police power, so therefore 1) it must be presumed that Congress did not wish to preempt this power, and 2) Section 209(a) must be given a crabbed interpretation at odds with its language. SCAQMD Br. 16-17, 25-26. But, as this Court has recognized, this presumption does not apply upon the bare invocation of a State's "police power." *United States* v. *Locke*, 529 U.S. 89, 107-08 (2000). To the extent such a presumption is ever appropriate when interpreting the scope (as opposed to the fact) of preemption, see *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 545-546 (1992) (Scalia, J., concurring in judgment in part and dissenting in part), it takes effect only when "Congress [has] legislated in [a] field which the States have traditionally occupied." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). In *Rice*, the Court applied this presumption only because previous cases recognized that the States had long oc-

SCAQMD Br. 37-39—is illogical. The fact that Congress imposed purchasing requirements elsewhere, *see* CAA Section 246, 42 U.S.C. § 7586, proves only that Congress views such requirements as appropriate under certain circumstances, and that it views such requirements as within its *own* prerogative to enact. It sheds no light, however, on whether the statutory term "standard" should be tortured to draw this distinction. Nor does Congress's decision to exercise its own prerogative to impose purchasing requirements remotely suggest that it permitted States to do the same. Rather, the details of those restrictions indicate that the contrary is true. Pet. Br. 31-33, 42-44; *see generally* Am. Auto. Leasing Ass'n Br.

cupied the relevant field of warehouse regulation. *Id.*; see also *Locke*, 529 U.S. at 107-08 (adopting same approach); *Buckman*, 531 U.S. at 347 (same).[9]

Here, in stark contrast, there is no history of action by the States. To claim that "[h]istorically, the states played the predominant role in mitigating air pollution from ... motor vehicle exhaust," SCAQMD Br. 17, is pure fantasy. Whereas the federal government had begun to address mobile source emissions by at least 1960, *Train* v. *NRDC*, 421 U.S. 60, 63 (1975), as of March 30, 1966, only California had adopted emissions standards. California was not *an* example of a State that adopted motor vehicle emissions standards, as the District misleadingly suggests, SCAQMD Br. 17—it was *the* example.[10] Given that in 1966, only one State out of 50 had actively addressed this issue, it is hardly an area that States have "traditionally occupied." *Rice*, 331 U.S. at 230.

Finally, the application of a "presumption against preemption" is foreclosed by the comprehensive treatment of preemption in the Clean Air Act. The Act draws a clear line between stationary sources (Title I) and mobile sources (Title II). With regard to the former, Congress recognized that "air pollution control at its source is the primary responsibility of

[9] The District and its supporting *amici* tout *Rice*, but fail to recognize this critical limitation on it. SCAQMD Br. 41; Natural Gas Vehicle Coalition Br. 3-4, 26-27. Instead, they treat *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996), as having held that the "presumption against preemption" applies whenever the States' "police power" can be said to be at issue. But *Locke* specifically cites *Medtronic* as a case in which the presumption was appropriate *because* the States in fact had historically occupied the area. 529 U.S. at 108.

[10] S. Rep. No. 90-403, at 32-33 ("To date only California has actively engaged in ... pollution control" of "emissions from motor vehicles."); Currie, *supra*, at 1085 ("with the exception of California, the states had done very little about vehicle pollution before the federal government acted in 1965). The fact that California was the only State to act on this issue is, of course, the very reason that it received in Section 209(b) a (limited) statutory waiver from the preemptive effect of Section 209(a). 42 U.S.C. § 7543(b); S. Rep. No. 90-403, at 33.



States and local governments." 42 U.S.C. § 7401(a)(4). Regarding the latter, Congress preempted State "standard[s] relating to the control of emissions" in Section 209(a). *Id.* § 7543(a); see *Engine Mfrs. Ass'n* v. *EPA*, 88 F.3d 1075, 1079 (D.C. Cir. 1996) ("In contrast to federally encouraged state control over stationary sources, regulation of motor vehicle emissions had been a principally federal project."); U.S. Br. 3-4. This distinction is largely ignored by respondents, who repeatedly cite cases regarding stationary sources in support of the supposed presumption. *E.g.*, SCAQMD Br. 17.

In Title II, Congress further elaborated on the scope of preemption by providing a safety valve—limited conditions under which States may enact "standards." 42 U.S.C. §§ 7543(b), 7505. In addition, it exempted particular areas from preemption (namely, the use, operation or movement of motor vehicles). *Id.* § 7543(d).[11] This statute, then, goes beyond a simple, express preemption clause; it is a comprehensive set of provisions that preempt state authority in general, then delineate particular areas in which States may act. Congress made quite plain when state and local standards are preempted and when they are not, and thereby left no room for any "presumption against preemption" in interpreting this statute. See *TRW, Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied ...."); cf. *Gade* v. *Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 100 (1992) (a statutory exemption to a preemption provision delimits the scope of preemption); *Am. Airlines*, 513 U.S. at 232 (same). In any event, any such presumption cannot justify refraining from enforcing Congress's command embodied in the plain language of the statute.

[11] The District argues in passing that the Fleet Rules are saved from preemption as "use" restrictions under Section 209(d). SCAQMD Br. 43; *see also* Natural Gas Coalition Br. 19. It concedes, however, that this argument has been forfeited. SCAQMD Br. 43. And it is atextual in any event: A restriction on purchasing a vehicle is not a restriction on its "use." AAM Br. 25.

c. The District next argues that the EPA has adopted its theory that the term "standard" means a "production mandate," and implicitly suggests deference to the EPA's supposed conclusion. Even if the EPA had adopted this position, such a conclusion would not merit deference.

The focus of the District's argument is a 1999 EPA opinion letter that was written during First Circuit litigation challenging Massachusetts automobile emissions standards that were ultimately held preempted. SCAQMD Br. app. at 57a ("SCAQMD App."); see *AIAM*, 208 F.3d 1. That letter does not take the position that the District ascribes to it. According to the District, that letter states that a "standard" "is" a "production requirement," SCAQMD Br. 13, or "includes, as an essential element, a 'production requirement,'" *id.* at 23. The letter says nothing of the sort. Rather than *equating* the term "standard" with production requirements, the EPA identified production requirements as *one type of* standard—which of course they are. SCAQMD App. 71a ("a standard, for the purposes of sections 177 and 209, would *include* the requirement to produce a certain number or percentage of vehicles ('production requirement') to meet a numerical emissions limitation") (emphasis added). Moreover, the letter reflected a clear understanding of the relationship between emissions standards and fleet restrictions. *Id.* at 72a ("A numerical emission limit, by itself has no real meaning absent a tie to the kind and number of motor vehicles to which the limit applies."). At no point did the letter even consider the distinction, advocated by the District, between production mandates and purchase restrictions.

In any event, the District fails to explain why deference to this letter would be warranted. SCAQMD Br. 23-25. In fact, in the very case in which the letter was submitted, the First Circuit declined to accord it deference. *AIAM*, 208 F.3d at 6. This Court's precedents support that conclusion. See generally *United States* v. *Mead Corp.*, 533 U.S. 218 (2001); *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000)



("Interpretations such as those in opinion letters ... do not warrant *Chevron*-style deference."). And the United States' rejection of the District's arguments in its brief here certainly obviates any deference that might otherwise be owed.

## II. THE FLEET RULES ARE NOT SAVED FROM PREEMPTION BY ANY OTHER SECTIONS OF THE CLEAN AIR ACT.

1. The District tries to narrow Section 209 by suggesting that the preemptive scope of the broad phrase "standard relating to the control of emissions" in Section 209(a) is limited to the particular method of implementing standards set forth in Section 202—*i.e.*, emissions limits applicable to new motor vehicles and engines. SCAQMD Br. 2-3, 12-13. This argument is pivotal, because without imputing an unnatural and constrained reading to the term "standard" in Section 209(a), respondents have no statutory hook for resisting the plain meaning of the statute.

This argument is, however, deeply flawed. It presupposes that, because Sections 202 and 209(a) both concern standards, the scope of those sections is identical. This is logically incorrect. "Standard" is a broad, generic term for "criteria" or "tests." See *supra* at 3; Pet. Br. 24. This underlying definition is, of course, consistent across Sections 202 and 209(a), but those sections concern different *aspects* of standard-setting. After all, there are many types of standards, and many ways in which standards can be enforced or implemented. One way is through a numerical limitation on emissions from new motor vehicles, like those set forth in Section 202. (Another is a purchase restriction; a third is a clean fleet rule.) But there is nothing in the statute to suggest that the scope of Section 209(a) is limited to this one category of standard-setting. U.S. Br. 14 ("Congress ... expressed no intent in Section 209(a) to limit that provision's preemptive effect to particular types of standards, such as numerical specifications for tailpipe emissions.").

The structure and text of the statute confirm that although

Sections 202 and 209(a) both govern aspects of the selfsame term "standard," they do so in different ways. Under Section 202, the EPA sets one type of standard. These numerical tailpipe standards are referred to as "emission standards," a term that throughout Title II denotes quantitative emissions limits, and always with explicit reference to Section 202 (or a parallel provision concerning quantitative emissions levels). *E.g.*, 42 U.S.C. §§ 7541(a)(2), 7545(c)(2)(A). The fact that Section 202 is focused on quantitative emissions limits is further apparent in its use of the term emissions "levels," *e.g.*, 42 U.S.C. § 7521(g)(1)-(2), (h), which this Court has previously interpreted as indicating quantitative limitations, see *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 283 (1978).

The text of Section 209(a), by contrast, provides no hint that its preemptive scope is limited to this single means of implementing standards. On the contrary, it prohibits States and localities from establishing "*any* standard relating to the control of emissions." It nowhere uses the term "emission standards." And nowhere does it refer to emissions "levels." Section 209(a) certainly makes no mention of "emissions-related production mandates." SCAQMD Br. 6. Instead, it uses the phrase "any standard relating to the control of emissions," which is manifestly broader, see Pet. Br. 22-28, and which appears only in provisions of the Clean Air Act related to preemption: Sections 209(a), 177, and 209(e)(2)(B) (as well as 209(e)(1) in slightly modified form). As the District recognizes, every word of the statute should be given meaning, SCAQMD Br. 29 (quoting *TRW*, 534 U.S. at 31), and the obvious import of this textual distinction is that Congress had different things in mind in Sections 202 and 209(a). The fact that Section 209(a) was enacted after Section 202, but uses different language, confirms that the two sections have different meanings and scope. 1A *Sutherland Statutory Construction* § 22:35, at 409 (6th ed. 2002) (where amendments are concerned, "a change in phraseology indicates a change in meaning"). Thus, the broader language and scope of Section 209(a) embrace both quantitative and qualitative emissions



criteria that new vehicles and engines are required to meet. U.S. Br. 15.

Indeed, it if were true, as the District posits, that Congress meant to confine the preemptive scope of Section 209(a) to the type of standard set forth in Section 202, Congress would have done so in express terms. Numerous provisions throughout Title II (and the CAA in general) refer to Section 202, and inevitably they do so explicitly. For example, Section 207(a)(2) mentions "emission standards promulgated under section 7521." 42 U.S.C. § 7541(a)(2). In total, provisions of Title II explicitly cross-reference Section 202 more than 50 times.[12] Yet Section 209(a) contains no such reference. It simply and generically applies sweepingly to "any standard." "Any standard" means just what it says—*any* standard—not just emissions-related production mandates applicable to manufacturers.[13]

This textual evidence is supported by the practical considerations noted above. *Supra* at 8-10. To limit the preemptive scope of Section 209(a) to one particular method of enforcing emissions standards—namely, numerical tailpipe limits or "production mandates"—would deprive it of all practical effect. States and localities could circumvent respondents' narrow construction simply by imposing onerous restrictions other than production mandates (whether on purchases or sales), which would altogether undermine Congress's overarching desire for uniformity.

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[12] *E.g.*, 42 U.S.C. §§ 7511a(c)(3)(B)(i) ("standards under section 7521"), 7522(a)(4) ("standards prescribed under section 7521"), 7522(b)(3) (same), 7525(e) (same), 7541(a)(1) ("applicable regulations under section 7521"), 7541(c)(3)(C) ("emission standards prescribed under section 7521"), 7545(c)(2)(A) (same).

[13] It is no answer that Section 209(b)(1)(C) requires compliance with Section 202 before a waiver can be granted. SCAQMD Br. 26-27. This requirement implies no necessary equivalence between Sections 202 and 209(a). Section 209(b) requires California to make various showings, including that its standards are "at least as protective of public health and welfare as applicable Federal standards," and that its standards are not inconsistent with Section 202.

The District's similar attempt to narrow the scope of Section 209(a) by reference to Section 209(e) is likewise unavailing. SCAQMD Br. 18. Section 209(e), which governs "[n]onroad engines or vehicles," mirrors Section 209(a). Similar to Section 209(a), it prohibits States and political subdivisions from "adopt[ing] or attempt[ing] to enforce any standard *or other requirement* relating to the control of emissions." 42 U.S.C. § 7543(e)(1) (emphasis added). The District argues that the definition of "standard" urged by Petitioners would render superfluous the "or other requirement" language of Section 209(e). It would not. First, the word "other" indicates that a "standard" is a type of "requirement"—it preempts standards, as well as other types of requirements. Second, there is a particular purpose for the specific inclusion of the term "requirement." That word refers back to the second sentence of Section 209(a), which prohibits States from "*requir[ing]* certification[s], inspection[s], or any other approval relating to the control of emissions." *Id.* § 7543(a) (emphasis added). It is, in sum, a shorthand meant to render 209(e) and 209(a) parallel; "standard" refers to the first sentence of 209(a), and "requirement" refers to the second sentence. This interpretation is confirmed by Section 209(c), which combines the approaches of 209(a) and 209(e), and prohibits "any standard or any requirement of certification, inspection, or approval." *Id.* § 7543(c); see also *id.* § 7522(a)(4) (referring to the certification and inspection provisions of § 7541 as "requirements").

2. Section 177 of the Clean Air Act confirms the conclusion that the Fleet Rules are preempted, and the District presents no serious argument to the contrary. As set forth in the opening brief (at 8-9 and 39-42), Section 177 permits States other than California to adopt California's "standards relating to control of emissions," but only so long as those standards are identical to California's. 42 U.S.C. § 7507. Important here, Section 177 makes clear that such States are not "authoriz[ed] ... to prohibit or limit, directly or indirectly, the manufacture or sale of a new motor vehicle or motor vehicle



engine that is certified in California as meeting California standards." *Id.*[14]

The Fleet Rules fail these requirements in two separate ways. First, as the District concedes, the Rules are not identical to the California standards. SCAQMD Br. 10. Their very purpose is to be more restrictive than the California standards, and to that end, the Rules permit the purchase of only "a subset of the vehicles currently available and certified for use in California." *Id.* Second, the Fleet Rules are foreclosed by Section 177's prohibition against limiting the sale of motor vehicles. There can be no question that, in prohibiting the purchase of certain vehicles, the Rules (at the very least) "limit ... indirectly[] the ... sale of a new motor vehicle ... that is certified in California." 42 U.S.C. § 7507. As the Second Circuit has held, Section 177 "prohibit[s] § 177 opt-in states from attempting to regulate against the sale of a particular type ... of California-certified cars." *Motor Vehicle Mfrs. Ass'n* v. *N.Y. State Dep't of Envtl. Conservation*, 17 F.3d 521, 536 (2d Cir. 1994). That is precisely what the Rules do here.

The strength of this argument is confirmed by the weakness of the District's response. The District suggests that, because the District "is not an 'opt in' state (or a political subdivision thereof) ... section 177 thus does not apply to it." SCAQMD Br. 42. This is simply extraordinary. There exists no theory of preemption (or federalism, for that matter) to explain why Congress would have precluded 49 States from legislating in this arena out of concern for balkanization, but permitted hundreds or thousands of political subdivisions to adopt such

[14] This proscription is separate from, and in addition to, Section 177's prohibition against the creation of a "third vehicle," as the District concedes. SCAQMD Br. 42. The lower court seems to have believed that the "third vehicle" problem was the sole purpose of Section 177. Pet. App. 26a-27a. Respondent NRDC and *amici* now extend this same error to Section 209(a), contending that "section 209(a) protects manufacturers *only* from having to produce a 'third vehicle.'" NRDC Br. 47; *id.* at 44-46; California Br. 4. This argument is mistaken. Pet. Br. 31.

restrictions. The District's further suggestion that there is "nothing remotely anomalous as a policy matter about exempting" the District from Section 177 is one more example of the District's willingness to ignore the language of the statute. SCAQMD Br. 42. Whether or not California is a "pioneer of air quality initiatives," *id.* at 43, there is nothing in the statute to suggest that California localities have broader rights than the several States.

3. Finally, the existence of Section 209(b) (and its companion provision, Section 177), supports preemption in this case. The District and its *amici* speak repeatedly of air pollution in California, and the need to solve this problem. But, there is no need to twist the language of the statute to serve this end. Congress provided a mechanism by which "standards related to the control of emissions," although otherwise preempted by Section 209(a), may be adopted and enforced. If California indeed faces "compelling and extraordinary conditions," 42 U.S.C. § 7543(b)(1)(B), it should follow the procedures set forth in Section 209(b) and seek a waiver from the EPA under Section 209(a). This it has not done. And the District's rejoinder that 49 States will be "aggrieved" by this requirement simply begs the question. As a textual matter, those States have no right to set "standards related to the control of emissions." And as a practical matter, allowing those 49 States to set emissions standards through fleet restrictions will open the door for thousands of localities to do the same. Whether the result would be uniform heightened standards (which would amount to a sales ban, and possibly require the production of a "third vehicle"), or a patchwork of standards (which would require the production of many new vehicles), Section 209(a) prohibits these outcomes.

## CONCLUSION

For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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December 22, 2003

Supreme Court, U.S.
FILED
AUG 29 2003
OFFICE OF THE CLERK

(9)

No. 02-1343

# In the Supreme Court of the United States

ENGINE MANUFACTURERS ASSOCIATION AND WESTERN STATES PETROLEUM ASSOCIATION, PETITIONERS

*v.*

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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## QUESTION PRESENTED

Section 209(a) of the Clean Air Act prohibits, subject to certain exceptions, States and their political subdivisions from adopting "any standard relating to the control of emissions from new motor vehicles." 42 U.S.C. 7543(a). The question presented is whether Section 209(a) prohibits a regional air quality district's rules requiring that operators of certain public and private vehicle fleets purchase specified types of new low-emission vehicles.

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# In the Supreme Court of the United States

No. 02-1343

ENGINE MANUFACTURERS ASSOCIATION AND WESTERN STATES PETROLEUM ASSOCIATION, PETITIONERS

*v.*

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

## INTEREST OF THE UNITED STATES

The United States, in cooperation with the individual States, has responsibility for implementing and enforcing the Clean Air Act, 42 U.S.C. 7401 *et seq.*, which, among other things, directs the United States Environmental Protection Agency (EPA) to administer provisions governing emissions from mobile sources. This case presents the question whether the Clean Air Act preempts a California regional air quality district from regulating emissions of new motor vehicles through rules restricting the types of vehicles that operators of vehicle fleets may purchase. The United States owns and operates vehicle fleets that are potentially subject to the rules at issue in this case. The United States' predominant interest in this case, however, arises from its responsibility to implement the Clean Air Act in accordance with Congress's carefully drawn division of federal and state authority over the regulation of emissions from motor vehi-

cles. The United States submits that Section 209(a) of the Clean Air Act preempts the regional air quality district's rules because those rules are "standard[s] relating to the control of emissions from new motor vehicles," 42 U.S.C. 7543(a), and California has not requested EPA to provide a waiver of preemption in accordance with Section 209(b), 42 U.S.C. 7543(b).

## STATEMENT

Petitioners, the Engine Manufacturers Association and the Western States Petroleum Association, brought this action to enjoin the State of California's South Coast Air Quality Management District (SCAQMD) from implementing its "Fleet Rules," which regulate, on the basis of emission characteristics, the types of new motor vehicles that operators of certain vehicle fleets may purchase. Petitioners claim that the Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.*, prohibits state and local authorities from promulgating those regulations. On cross-motions for summary judgment, the United States District Court for the Central District of California rejected petitioners' preemption challenge. Pet. App. 3a-27a. The court of appeals affirmed for the reasons stated in the district court's opinion. *Id.* at 1a-2a.

### A. The Clean Air Act

Congress enacted the Clean Air Act in 1963 to assist state efforts to control air pollution. See Act of Dec. 17, 1963, Pub. L. No. 88-206, 77 Stat. 392. Since that time, Congress has substantially expanded the Act's scope and the federal government's role, primarily through significant amendments in 1967, 1970, 1977, and 1990. See Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485; Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676; Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685; Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399. Throughout that evolution, the Clean Air Act has remained a



program of cooperative federalism, under which "the States and the Federal Government [are] partners in the struggle against air pollution." *General Motors Corp.* v. *United States*, 496 U.S. 530, 532 (1990).

Title I sets out a central part of the Clean Air Act's regulatory framework, which rests on the federal government's establishment of "national ambient air quality standards" (NAAQSs) that are to be achieved, in substantial part, through each State's development of a "State implementation plan" (SIP). See CAA §§ 101-110, 42 U.S.C. 7401-7410. Title I addresses numerous aspects of air pollution control, including measures and timetables for achieving the NAAQSs in "non-attainment areas." See CAA §§ 171-193, 42 U.S.C. 7501-7515. Title II governs control of pollution from mobile sources, such as motor vehicles. See CAA §§ 201-250, 42 U.S.C. 7521-7590. The Title II provisions are the focus of this litigation.[1]

In the case of each of those Titles, Congress gave careful attention to the respective roles of the federal and state or local governments in administering the Clean Air Act. As a general matter, Congress assigned to EPA significant responsibilities for administering the Clean Air Act, while preserving each State's authority to supplement the Act's provisions with additional measures under state law. Congress, however, placed special limits on state authority in the case of mobile emission sources. Hence, Title I's general provision governing "Retention of State authority" recognizes that, while States largely retain the right to adopt or enforce pollution control measures more stringent than federal law requires, Title II's provisions preempt "certain

[1] The Clean Air Act includes five other titles addressing: general provisions, including definitions (Tit. III, 42 U.S.C. 7601-7627); noise pollution (Tit. IV, 42 U.S.C. 7641-7642); acid deposition control (Tit. IV-A, 42 U.S.C. 7651-7651o); permits (Tit. V, 42 U.S.C. 7661-7661f); and stratospheric ozone protection (Tit. VI, 42 U.S.C. 7671-7671q).

State regulation of moving sources." CAA § 116, 42 U.S.C. 7416.

Title II's provisions delineate the division between federal and state authority over emissions from new motor vehicles. Section 202(a)(1) specifically directs EPA to establish "standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines." 42 U.S.C. 7521(a)(1). Section 209(a) further provides, in relevant part, that:

> No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part.

42 U.S.C. 7543(a).

Section 209(b) authorizes EPA to waive application of that provision, subject to specific requirements, in the case of

> any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966.

42 U.S.C. 7543(b). The only State that qualifies to seek such a waiver is California. See *Motor Vehicle Mfrs. Ass'n* v. *New York State Dep't of Envt'l Conservation*, 79 F.3d 1298, 1302 (2d Cir. 1996); S. Rep. No. 403, 90th Cong., 1st Sess. 33 (1967). Section 177 of the Clean Air Act provides, however, that States other than California may adopt any standards that EPA has approved for California, provided that such state standards are "identical" to those of California and are enacted two years before they become effective. 42 U.S.C. 7507.

Section 209(d) preserves the ability of States to regulate motor vehicle use and operation other than by standards



relating to the control of emissions from new vehicles, stating:

> Nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate or restrict the use, operation, or movement of registered or licensed motor vehicles.

42 U.S.C. 7543(d). Consistent with Section 209(d), Section 108(f) requires that EPA provide state and local governments with information on a detailed list of specific types of "transportation control measures," 42 U.S.C. 7408(f), and Section 182 provides additional measures that States may (or must) put into effect, including "Motor vehicle inspection and maintenance" programs, *e.g.*, 42 U.S.C. 7511a(b)(4), and an "economic incentive program," 42 U.S.C. 7511a(g)(4).

In Sections 241 through 250, added through the 1990 Amendments, Congress established a "clean-fuel vehicle" program that combines elements of federal and state authority, consistent with the division of authority set out in Section 209. See 42 U.S.C. 7581-7590. Congress directed EPA to issue regulations defining emissions standards for "clean-fuel vehicles." CAA §§ 242-245, 42 U.S.C. 7582–7585. Congress in turn directed States that embraced specified non-attainment areas to develop and submit revisions to their SIPs establishing clean-fuel fleet programs (CFFPs). CAA § 246, 42 U.S.C. 7586. Section 246(b) provides that, under those state programs, a defined percentage (beginning at 30% and later increasing to 70%) "of all new covered fleet vehicles in model year 1998 and thereafter * * * shall be clean-fuel vehicles and shall use clean alternative fuels when operating in the covered area." 42 U.S.C. 7586(b). Congress has authorized States to seek EPA approval of substitute programs in lieu of the federal clean-fuel vehicle program. CAA § 182(c)(4)(A), 42 U.S.C. 7511a(c)(4)(A). Only four States that are subject to the CFFP requirement have

implemented the program; the others, including California, have elected to adopt substitute programs. See, *e.g.*, 64 Fed. Reg. 46,849 (1999).[2]

**B. The California Regulatory Scheme**

The State of California has charged the California Air Resources Board (CARB) with responsibility to administer that State's air pollution control programs. Cal. Health & Safety Code § 39003 (West 1996). CARB has developed a detailed program of emission controls for new motor vehicles. See Cal. Code. Regs. tit. 13, §§ 1950 *et seq.* (2003). CARB has also applied for and generally received EPA waivers for particular elements of this program, in accordance with Section 209(a) and (b) of the Clean Air Act, 42 U.S.C. 7543(a) and (b), relieving California from the Clean Air Act's prohibition of state standards "relating to the control of" new motor vehicle emissions. See 68 Fed. Reg. 19,811 (2003); 58 Fed. Reg. 4166 (1993). CARB's authority to adopt its program of emission controls has not been disputed in this proceeding.

CARB has adopted, among its various motor vehicle controls, a light- and medium-duty vehicle program that includes five tiers of emissions standards for passenger cars, light-duty trucks, and medium-duty vehicles: (1) transitional low-emission vehicles, or TLEVs; (2) Low-Emission Vehicles, or LEVs; (3) Ultra-Low-Emission Vehicles, or ULEVs;

[2] Congress also directed EPA to establish, as a pilot program, a federal clean-fuel vehicle program for California that would "demonstrate the effectiveness of clean-fuel vehicles in controlling air pollution in ozone nonattainment areas." CAA § 249, 42 U.S.C. 7589. Section 249(c) directs EPA to issue regulations requiring manufacturers to produce specified numbers of clean-fuel vehicles (not necessarily for fleet use) and sell them in California, 42 U.S.C. 7589(c)(1), and requiring California to adopt provisions making clean alternative fuels available in that State, 42 U.S.C. 7589(c)(2). Other States may participate in this program under specified conditions, CAA § 249(f), 42 U.S.C. 7589(f), but no State has elected to do so.



(4) Super Ultra-Low-Emission Vehicles, or SULEVs; and (5) zero-emission vehicles, or ZEVs. See Pet. App. 13a-14a; Cal. Code. Regs. tit. 13, § 1960.1 (2003). California has also established an Urban Bus Program, which provides that operators of urban bus fleets must notify CARB whether they intend to comply through a "diesel path" or through an "alternative-fuel path," and defines emissions standards for those "paths." See Pet. App. 14a-15a; Cal. Code Regs., tit. 13, §§ 1956.2 *et seq.* (2003).

**C. The SCAQMD Fleet Rules**

The State of California has assigned the South Coast Air Quality Management District (SCAQMD) responsibility for controlling air pollution in the Los Angeles area, which is the only region in the United States that has been designated an "extreme" nonattainment area under the Clean Air Act. See 40 C.F.R. 81.305. In response to Los Angeles's extraordinary air pollution problems, the SCAQMD has adopted extensive control measures, including the AQMD Fleet Vehicle Rules (updated May 4, 2001) (Fleet Rules) <http://www.aqmd.gov/news1/Fleet_Rule_Home.htm>. The Fleet Rules, which SCAQMD adopted in 2000, require that operators of certain motor vehicle fleets purchase or lease low-emission vehicles. Six of those rules are at issue here:

- Rule 1186.1 requires public operators of street sweeper fleets (and private parties operating under contract to public entities) to acquire alternative-fuel vehicles.

- Rule 1191 requires public entities operating fleets of passenger cars, light-duty trucks, or medium-duty vehicles to acquire vehicles that meet LEV standards or that utilize alternative fuel.

- Rule 1192 requires public transit fleet operators (and private entities under contract to such operators) to acquire alternative-fuel heavy-duty vehicles.

- Rule 1193 requires public and private solid waste collection fleet operators to acquire alternative-fuel heavy-duty vehicles.

- Rule 1194 requires public and private operators of fleets of passenger cars or medium-duty vehicles that transport passengers to and from airports (including taxis, limousines, and shuttles) to acquire specified percentages of ULEVs, SULEVs or ZEVs. Heavy-duty vehicles acquired by operators of airport transport fleets must utilize alternative fuel.

- Rule 1196 requires public entities operating fleets of heavy-duty vehicles to acquire vehicles that utilize alternative fuel, dual fuel, or gasoline.

Pet. App. 15a-19a; J.A. 16-74. Those rules generally apply only to entities operating fleets of 15 or more vehicles. See *ibid.* Several of the rules provide for exceptions if the required types of vehicles are unavailable. See Pet. App. 18a-19a; Rules 1186.1(e), 1191(f)(8) (J.A. 21, 30). Some of the rules also have phase-in periods or other provisions that mitigate their application. Rule 1186.1 (permitting transitional use of diesel street sweepers) (J.A. 16); Rule 1193 (permitting fleets of fewer than 50 refuse collection vehicles to acquire dual-fuel vehicles) (J.A. 52). The rules contain no exemption for vehicle fleets owned or operated by the United States or its instrumentalities. See, *e.g.*, Rule 1191(b) (specifically listing "federal" fleets as among those subject to the rule) (J.A. 24).



**D. The Proceedings Below**

Petitioners assert that Section 209(a) of the Clean Air Act preempts the SCAQMD's Fleet Rules because each of those rules is a "standard relating to the control of emissions from new motor vehicles." 42 U.S.C. 7543(a). Petitioners and SCAQMD each moved for summary judgment, stipulating that no material facts were in dispute. Pet. App. 19a-20a. The district court granted summary judgment to defendants. *Id.* at 20a-27a.

The district court concluded that the Fleet Rules "impose no new emission requirements on manufacturers whatsoever, and therefore do not run afoul of Congress's purpose behind motor vehicle preemption: namely, the protection of manufacturers against having to build engines in compliance with a multiplicity of standards." Pet. App. 21a. The district court further reasoned that the Fleet Rules "do not set a 'standard relating to the control of emissions'" because, "[r]ather than imposing any numerical control on new vehicles, the rules regulate the purchase of previously-certified vehicles." *Ibid.* In so stating, the court attached significance to the fact that the SCAQMD's Fleet Rules allow purchase of a subset of those vehicles that CARB, with EPA's approval, had certified for sale in California. *Id.* at 21a-22a; see pp. 6-7, *supra*.

The district court recognized that the First Circuit in *Association of International Automobile Manufacturers, Inc.* v. *Commissioner*, 208 F.3d 1 (2000), and the Second Circuit in *American Automobile Manufacturers Ass'n* v. *Cahill*, 152 F.3d 196 (1998), had each treated a state sales requirement of ZEV vehicles as a "standard 'relating to the control of emissions.'" Pet. App. 22a. The district court distinguished the SCAQMD's Fleet Rules on the ground that each rule regulates "the *purchase* of vehicles * * * from among a subset of previously certified California vehicles"

and "does not compel manufacturers to meet a new emissions limit." *Id.* at 23a.

The district court also found support for its conclusion in Section 246 of the Clean Air Act, which authorizes States to develop clean-fuel fleet programs for non-attainment areas. See 42 U.S.C. 7586. The district court reasoned that Section 246 expresses Congress's understanding that States may regulate vehicle fleets. Pet. App. 23a. The district court additionally suggested that the Fleet Rules are state health and safety regulations that are entitled to a presumption of validity. *Id.* at 23a-24a. Finally, the court rejected petitioners' arguments that the Fleet Rules violate Section 177 of the Clean Air Act, 42 U.S.C. 7507, by imposing restrictions that are stricter than EPA has authorized California to impose pursuant to Section 209(b)'s waiver provisions. Pet. App. 24a-27a.

The court of appeals issued an order affirming the district court's decision for the reasons stated in the district court's opinion, Pet. App. 1a-2a, and denied petitions for rehearing and rehearing en banc, *id.* at 28a-29a.

## SUMMARY OF ARGUMENT

Congress has expressly defined the scope of the Clean Air Act's preemption of state laws regulating new vehicle emissions. Section 209(a) states in relevant part that "[n]o State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles." 42 U.S.C. 7543(a). The SCAQMD's Fleet Rules fall squarely within the terms of Section 209(a)'s prohibition because they impose specific emission-related requirements on new vehicles purchased by fleet operators. Section 209(a) consequently preempts the Fleet Rules unless and until California applies for and receives a waiver of Section 209(a)'s prohibition through Section 209(b). See 42 U.S.C. 7543(b).



A. Section 209(a) preempts a state or local law if that law constitutes "any standard" that "relat[es] to the control of emissions" from "new motor vehicles." 42 U.S.C. 7543(a). Section 209(a)'s reference to "any standard" embraces, by its ordinary and legal meanings, a broad range of regulations, including both quantitative and other emissions criteria that specified vehicles or engines are required to meet. Section 209(a)'s prohibition of standards "relating to the control of emissions" from new vehicles expresses Congress's intent essentially to occupy the field of controlling emissions from those vehicles through standards, except to the extent that Congress has expressly, or by clear implication, authorized state regulation. Congress's extension of preemption only to standards relating to the control of emissions from "new vehicles" identifies the limits of the federal government's largely exclusive sphere and generally preserves state regulation of, for example, the "use, operation, or movement of registered or licensed vehicles." CAA § 209(d), 42 U.S.C. 7543(d).

B. Section 209(a) preempts the SCAQMD's Fleet Rules because they fall squarely within the statutory prohibition. The Fleet Rules are "standard[s] relating to the control of emissions from new motor vehicles," 42 U.S.C. 7543(a), because they require a fleet operator to make purchasing decisions with respect to new vehicles based on their emission characteristics. The Rules cannot be distinguished from concededly invalid state regulations imposing "sales requirements" because a state regulation that restricts what vehicles a resident can purchase correspondingly limits what vehicles a manufacturer can sell. The Fleet Rules cannot be justified on the basis that they merely require purchasers to choose from a subset of vehicles that EPA has approved for sale in California because requiring fleet operators to select vehicles from only that subset is impermissible in the absence of EPA's approval of that added restriction. The

Clean Air Act's specific provisions governing centrally-fueled fleets indicate that Congress did not believe that States would be free to regulate vehicle fleets however they chose. Rather, the Clean Air Act specifically addresses the spheres of federal and state responsibility and provides legislative guidance that supplants general presumptions respecting the validity of state regulations. Under the Clean Air Act's provisions, the State of California may seek EPA approval of the Fleet Rules in accordance with Section 209(b), 42 U.S.C. 7543(b). But unless and until EPA approves the Fleet Rules, they are invalid and may not be enforced.

## ARGUMENT

### SECTION 209(a) OF THE CLEAN AIR ACT PREEMPTS THE SCAQMD FLEET RULES

Under this Court's settled preemption jurisprudence, "Congress can define explicitly the extent to which its enactments pre-empt state law." *English* v. *General Elec. Co.*, 496 U.S. 72, 78 (1990). Congress has exercised that power through Section 209(a) of the Clean Air Act, which states that "[n]o State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines." CAA § 209(a), 42 U.S.C. 7543(a). Section 209(a) expressly preempts the SCAQMD's Fleet Rules because those rules, which impose emission-related criteria respecting new motor vehicles, qualify as "standard[s] relating to the control of emissions from new motor vehicles." CAA § 209(a), 42 U.S.C. 7543(a). The SCAQMD cannot impose such rules on vehicle fleets unless EPA grants a waiver of Section 209(a)'s prohibition through the process set out in Section 209(b). 42 U.S.C. 7543(b).



#### A. Section 209(a) Prohibits A State Or Political Subdivision From Adopting "Any Standard Relating To The Control Of Emissions From New Motor Vehicles"

Congress has set out specific conditions for preemption of state or local laws respecting mobile sources of air pollution. Section 209(a), in relevant part, preempts a state or local law if that law constitutes "any standard" that "relat[es] to the control of emissions" from "new motor vehicles." 42 U.S.C. 7543(a). Section 209(a)'s precise terms, particularly when read in light of its statutory context and history, limit the authority of States and their subdivisions to control motor vehicle emissions through regulation of the design, production, sale, purchase, or licensing of new vehicles.

1. Section 209(a)'s reference to "any standard" necessarily denotes that federal preemption reaches an extensive range of regulatory activities. The term "standard," in ordinary usage and legal parlance, embraces a broad variety of criteria or rules. For example, *Webster's Third New International Dictionary* (1993), defines a "standard," in pertinent part, as including:

> **3 a:** something that is established by authority, custom, or general consent as a model or example to be followed: CRITERION, TEST **b:** a definite level or degree of quality that is proper and adequate for a specific purpose;
>
> **4:** something that is set up and established by authority as a rule for the measure of quantity, weight, or quality * * *; [and]
>
> **7 a:** a carefully thought-out method of performing a task <auditing ~*s*> **b:** carefully drawn specifications covering manufacturing material or equipment.

*Id.* at 2223. *Black's Law Dictionary* (7th ed. 1999) similarly defines the term "standard" to include a "criterion for meas-

uring acceptability, quality, or accuracy." *Id.* at 1412-1413. See *Black's Law Dictionary* 1259 (5th ed. 1979) ("A measure or rule applicable in legal cases such as the 'standard of care' in tort actions.").

The Clean Air Act uses the term "standard" in various contexts to include a wide array of regulatory provisions. That usage reflects Congress's understanding that the term has a broad, encompassing meaning that conforms to the structure and purpose of the provision in which it is used. For example, the Act directs EPA to prescribe "ambient air quality standards," CAA § 109, 42 U.S.C. 7409, which are regulations specifying health-and-welfare-based levels for the "maximum airborne concentration of a pollutant." *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 465 (2001). The Act also directs EPA to establish "standards of performance" for certain pollution sources, *e.g.*, CAA § 111, 42 U.S.C. 7411, which include not only "a requirement of continuous emission reduction," but "any requirement relating to the operation or maintenance of a source to assure continuous emission reduction," CAA § 302(*l*), 42 U.S.C. 7602(*l*). The Act further directs EPA to establish "emission standards" for certain stationary sources, *e.g.*, CAA §§ 112(c)(2), 42 U.S.C. 7412(c)(2), which include not only "requirement[s]" that "limit[] the quantity, rate, or concentration of emissions of air pollutants on a continuous basis," but also "any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter," CAA § 302(k), 42 U.S.C. 7602(k).

Congress did not define the term "standard" for purposes of Section 209(a), but it also expressed no intent in Section 209(a) to limit that provision's preemptive effect to particular types of standards, such as numerical specifications for tailpipe emissions. If Congress had intended that result, it



could have easily said so. Rather, both the ordinary and the legal definitions of "standard," coupled with Congress's varied usage of that term throughout the Clean Air Act, demonstrate that Section 209(a)'s reference to "any standard" is constrained primarily by context and embraces both quantitative and non-quantitative emission criteria that new vehicles and engines are required to meet.[3]

2. Section 209(a) prohibits States and their subdivisions from adopting any standard "relating to the control of emissions" from new motor vehicles or new motor vehicle engines. 42 U.S.C. 7543(a). This Court has previously treated the term "relate to," in the context of federal preemption statutes, as prohibiting state laws that have "a connection with or reference to" the federal statute's predicate. See *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 147 (2001) ("state law relates to an ERISA plan 'if it has a connection with or reference to such a plan'") (quoting *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)); *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("Since the relevant language of the ADA is identical, we think it appropriate to adopt the same standard here."). The Clean Air Act's use of the phrase "relating to" is indistinguishable. Section 209(a) accordingly prohibits those state or local standards that

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[3] As an historic matter, both EPA and Congress have expressed the understanding that the term "standard" is not limited to quantitative measures of tailpipe emissions for particular vehicles. In promulgating "standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles" pursuant to Section 202(a)(1), 42 U.S.C. 7521(a)(1), EPA has shifted from typically specifying defined emissions criteria for particular classes of vehicles to also allowing manufacturers to choose what mix of vehicles to produce to attain fleetwide averages. See 65 Fed. Reg. 6698 (2000); 50 Fed. Reg. 10,606 (1985). In the 1990 Clean Air Act Amendments, Congress enacted Section 202(g), which directed EPA to issue standards under Section 202(a) that phased in new emissions criteria over specified percentages of a manufacturer's sales volume, again indicating that the term "standards" is not limited to quantitative tailpipe emissions requirements for individual vehicles.

"ha[ve] a connection with or reference to" controlling emissions from new motor vehicles. *Egelhoff*, 532 U.S. at 147.

Section 209(a)'s "relating to" formulation is, by its terms, broadly encompassing. See, *e.g.*, *Morales*, 504 U.S. at 383-384 (the phrase "relating to" expresses "a broad pre-emptive purpose"). Nevertheless, that formulation should not be applied with such "uncritical literalism" that it would reach through "infinite connections" to state or local regulation that bears only the most attenuated relationship to controlling emissions from new motor vehicles. See *Egelhoff*, 532 U.S. at 147; *California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997); *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 656 (1995). Rather, Section 209(a) expresses Congress's understanding that it has "largely pre-empted the field with regard to 'emissions from new motor vehicles,'" *Washington* v. *General Motors Corp.*, 406 U.S. 109, 114 (1972). See *Egelhoff*, 532 U.S. at 152-153 (Scalia, J., concurring) (suggesting that ERISA's "relate to" formulation constitutes "a reference to our established jurisprudence concerning conflict and field pre-emption"); *Dillingham Constr., N.A., Inc.*, 519 U.S. at 336 (Scalia, J. concurring) (the "relate to" formulation "identif[ies] the field in which ordinary *field pre-emption* applies"); cf. *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 372 n.6 (2000) (stating that "'*field*' preemption may fall into any of the categories of express, implied, or conflict preemption").

The scope of Section 209(a)'s preemptive effect should be measured by reference to Congress's objectives. See *Egelhoff*, 532 U.S. at 147; *Dillingham*, 519 U.S. at 325. Congress affirmatively assigned the federal government central responsibility for developing standards for controlling emissions from new motor vehicles. See, *e.g.*, CAA § 202, 42 U.S.C. 7521. Alternative state or local rules that effectively



establish emission criteria for such vehicles, whether through equivalent or alternative methods, are at the core of standards "relating to the control of emissions." CAA § 209(a), 42 U.S.C. 7543(a). Whatever its ultimate reach, Section 209(a) surely prohibits a State or its political subdivision from unilaterally promulgating regulations that would effectively subject new vehicle manufacturers and the prospective purchasers of those vehicles to an additional set of emission-based limitations.

Viewed in that light, Section 209(a) generally preempts state or local regulations that require new motor vehicles to satisfy quantitative or non-quantitative emissions criteria as a condition of sale or licensing. Such requirements constitute standards relating to the control of emissions from such vehicles that, contrary to Section 209(a)'s core objective, burden the design and production of new motor vehicles. See pp. 19-21, *infra*.[4]

3. Section 209(a) broadly prohibits any standard relating to the control of emissions, but only if those emissions are emitted from "new motor vehicles or new motor vehicle engines." 42 U.S.C. 7543(a). That limitation imposes a significant restriction on the scope of Section 209(a)'s preemptive effect. Section 209(a) expressly preempts state regulation—including "certification, inspection, or any other ap-

[4] By contrast, Section 209(a) would not generally reach state voluntary or incentive programs that merely encourage vehicle manufacturers to sell, or consumers to buy, vehicles with particular emission characteristics. Such programs are not within the meaning of the term "standard," as used in Section 209(a), because they they do not impose "enforce[able]" requirements. See CAA § 209(a), 42 U.S.C. 7543(a). So long as such a program were not structured in such a way as to create substantial barriers to market entry, it would not interfere with Section 209(a)'s core objective of preventing disruption of the nationwide market for new motor vehicles. See, *e.g.*, *Egelhoff*, 532 U.S. at 147 (evaluating the "objectives" of the federal statute and the "nature of the effect of the state law" as "a guide to the scope of the state law that Congress understood would survive").

proval relating to the control of emissions from any new motor vehicle"—up to and including the point of the "initial retail sale, titling (if any), or registration of such vehicle." 42 U.S.C. 7543(a). See CAA § 216(3), 42 U.S.C. 7550(3) (defining a "new motor vehicle" as "a motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser"). States and their political subdivisions may require that used vehicles be retrofitted with emissions control devices, but they may not exercise their authority in a manner that would, in practical effect, establish an emissions standard for new motor vehicles. See *Allway Taxi, Inc.*, v. *City of New York*, 340 F. Supp. 1120, 1124 (S.D.N.Y. 1972), aff'd, 468 F.2d 624 (2d Cir. 1972) (per curiam). States and their political subdivisions also remain free to "control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles," CAA §209(d), 42 U.S.C. 7543(d), subject to the application of implied preemption principles. See 340 F. Supp. at 1124; cf. *California* v. *Department of the Navy*, 624 F.2d 885, 888 (9th Cir. 1980).[5]

[5] The Clean Air Act elsewhere recognizes a State's authority to regulate the use of vehicles. For example, Section 108(f) refers to a list of state transportation control measures, and Section 182(g)(4) states that States have some authority to adopt incentive programs. See 42 U.S.C. 7408(f), 7511a(g)(4). A State's authority under those provisions, however, is not unlimited. For example, an incentive program or related state initiative may well be preempted if it frustrates Section 209(a)'s purpose by acting as a substantial barrier to the entry of new motor vehicles into the marketplace. Other provisions of the Clean Air Act may signal further limitations on the ability of States to adopt incentive programs. For example, Section 249(f)(3), 42 U.S.C. 7589(f)(3), sets forth a list of incentives States may offer to induce participation in a clean-fuel vehicle pilot test program, which would seem to have little function if incentives were generally available to States without restriction. Whatever the scope of a State's ability to adopt incentive programs, however, the Fleet Rules cannot be justified on that basis, because they prohibit market entry by mandating particular purchases based on emission criteria. They are "standards" and not incentive programs.



4. The text of Section 209(a) manifests the division of federal and state authority reflected throughout the Clean Air Act's mobile emissions provisions. Those provisions reflect Congress's judgment that the federal government should exercise primary responsibility for developing strategies for controlling emissions from new vehicles, while States may exercise a restricted role consistent with federal initiatives and subject to federal guidance, oversight, and approval.

For example, Congress gave the federal government primary responsibility for developing standards to control emissions from new motor vehicles, see CAA § 202(a), 42 U.S.C. 7521(a), while recognizing that the States retain authority to control emissions by regulating the operation and use of vehicles or by establishing emissions criteria for such vehicles once they are no longer new, *e.g.*, CAA §§ 108(f), 182(d)(1) and (e)(4), 42 U.S.C. 7408(f), 7511a(d)(1) and (e)(4) (transportation and traffic control measures); CAA § 182(a)(2)(B), (b)(4), (c)(3), 42 U.S.C. 7511a(a)(2)(B), (b)(4), (c)(3) (vehicle inspection and maintenance measures).

The Clean Air Act's provisions allocating authority between the federal government and the States reflect Congress's understanding of the importance of maintaining uniform standards for new motor vehicles. Nationally uniform regulatory standards provide public benefits by allowing automobile manufacturers to realize economies of scale in producing largely standardized vehicles for sale at affordable prices in all 50 States and the District of Columbia. Section 209 embodies a compromise between the public benefits of a nationally uniform approach to vehicle emission controls and the preference of some States to preserve their traditional role in regulating motor vehicles. Congress opted to employ uniform federal standards for new vehicles, subject to the exception that California may depart from those standards if it satisfies Section 209(b)'s waiver requirements. See H.R.

Rep. No. 728, 90th Cong., 1st Sess. 20-23 (1967); S. Rep. No. 403, 90th Cong., 1st Sess. 33 (1967); 113 Cong. Rec. 30,950 (1967) (statement of Rep. Springer); *id.* at 32,478 (statement of Sen. Murphy); see generally *Motor & Equip. Mfrs. Ass'n* v. *EPA*, 627 F.2d 1095, 1108-1111 (D.C. Cir. 1979) (MEMA), cert. denied, 446 U.S. 952 (1980).

Since that time, Congress has continued to grant the federal government primacy in controlling emissions from new motor vehicles, subject to specific exceptions that preserve the core policy of national uniformity. For example, Congress amended the Clean Air Act in 1977 to allow other States to adopt emissions standards for new motor vehicles "identical" to those EPA has authorized California to employ. See CAA § 177, 42 U.S.C. 7507. Section 177 specifically provides, however, that States choosing to adopt the California emissions standards may not "prohibit or limit, directly or indirectly, the manufacture or sale of a new motor vehicle or motor vehicle engine that is certified in California as meeting California standards" or "take any action of any kind to create, or have the effect of creating, a motor vehicle or motor vehicle engine different than a motor vehicle or engine certified in California under California standards (a 'third vehicle') or otherwise create such a 'third vehicle.'" 42 U.S.C. 7507.[6]

[6] Congress adhered to that policy in adopting the "clean-fuel vehicle" provisions in the 1990 Amendments. See CAA §§ 241-250, 42 U.S.C. 7581-7590. Congress drew the definitions of vehicle classes in these provisions from the standards of California's LEV program. CAA § 243, 42 U.S.C. 7583 (setting forth standards for CFFP vehicles); see Cal. Code Regs. tit. 13, § 1900 (2003). Congress also provided that, if California altered its standards, the new California standards would supersede those set forth in the 1990 Amendments, CAA § 243(e), 42 U.S.C. 7583(e). Congress further required EPA to administer and enforce the CFFP program in the same manner as does the State of California (unless the State's interpretation is inconsistent with the Act's requirements). CAA § 244, 42 U.S.C. 7584. Those provisions all serve to avoid proliferation of new vehicle emissions standards and fragmentation of the market. See generally Henry A. Waxman et al., *Cars, Fuels, and Clean Air: A Legislative History of Title II of the Clean Air Act Amendments of 1990*, 21 Envt'l L. 1947, 1998-2001 (1991).



Section 209(a)'s preemptive prohibitions accordingly play a vital role in effectuating Congress's judgment that the federal government should exercise primary responsibility for controlling emissions from new motor vehicles. Congress recognized that the States can play a complementary role, but they should not be allowed unilaterally to subject new motor vehicles to a variety of uncoordinated emission control requirements that could needlessly fragment the national marketplace for such vehicles. Section 209(a)'s prohibitions, in combination with Section 209(b)'s waiver provision, strike a balance between the national interest in uniform federal requirements and the state interest in developing additional initiatives in response to local conditions.

### B. The SCAQMD Fleet Rules Are Standards "Relating To The Control Of Emissions From New Motor Vehicles"

Section 209(a) of the Clean Air Act preempts the SCAQMD's Fleet Rules because those regulations are "standard[s] relating to the control of emissions from new motor vehicles," 42 U.S.C. 7543(a), and the State of California has not sought and obtained a waiver of Section 209(a)'s prohibition through Section 209(b), 42 U.S.C. 7543(b). The Fleet Rules are "standards" because they require fleet operators to purchase new vehicles in accordance with specific emissions criteria that those vehicles must meet. They "relat[e] to the control of emissions" because they restrict a fleet operator's purchasing decisions in order to control new vehicle emissions. Indeed, the Fleet Rules explicitly make reference to the purpose of controlling emissions. See, *e.g.*, Rules 1186.1(a), 1191(a), 1192(a), 1193(a), 1194(a), 1196(a) (J.A. 16, 24, 46, 52, 58, 66). And the Rules incontrovertibly apply to all purchases, including *new* vehicle purchases. See,

*e.g.*, Rules 1186.1(d), 1191(e), 1192(d), 1193(d), 1194(d), 1196(d) (J.A. 19, 27, 48, 54, 61, 68). The Fleet Rules therefore fall squarely within Section 209(a)'s prohibition and cannot be adopted or enforced without first obtaining EPA's waiver of that prohibition through Section 209(b).

The district court reasoned that the Fleet Rules fall outside of Section 209(a)'s prohibition because, "[r]ather than imposing any numerical control on new vehicles, the rules regulate the purchase of previously-[CARB]-certified vehicles." Pet. App. 21a. The court noted that Section 246 of the Clean Air Act directs States to impose air-quality based restrictions on fleet vehicle purchases in prescribed circumstances, *id.* at 23a, and stated that it "is not rational" to conclude that Section 209(a) would prohibit them in other circumstances. Invoking the principle that state laws regulating public health and safety "are presumed to be valid," the court concluded that "the Fleet Rules do not constitute unlawful standards 'relating to the control of emissions.'" *Id.* at 24a. That reasoning, at each of its critical junctures, is unsound.

1. The district court was mistaken in concluding that the Fleet Rules do not qualify as "standards" for purposes of Section 209(a) because they do not impose "any numerical control" on new vehicles. Pet. App. 21a. As demonstrated above, the Clean Air Act employs the term "standard" in Section 209(a) in its natural sense to reach a broad spectrum of regulatory requirements and criteria beyond specific tailpipe emission limitations. Section 209(a)'s use of the term "standard" necessarily embraces the Fleet Rules, which regulate a fleet operator's purchase or lease of new vehicles based on the numerical emission characteristics (*e.g.*, the LEV and ULEV requirements) or emissions control design characteristics (*e.g.*, the alternative-fuel requirement) of the qualifying new vehicles. See *Association of Int'l Auto. Mfrs.* v. *Commissioner*, 208 F.3d 1, 6-7 (1st Cir. 2000) (*AIAM*);



*American Auto. Mfrs. Ass'n* v. *Cahill*, 152 F.3d 196, 200 (2d Cir. 1998) (*AAMA*).[7]

The Fleet Rules are in principle no different than requirements specifying that fleet operators may purchase only particular new vehicles that meet specific tailpipe emissions criteria (or incorporate design features that accomplish that result), or that fleet operators may purchase only new vehicles that collectively conform to some fleet-wide average aggregate tailpipe emissions limitation. A State's unilateral imposition of any such requirement would result in a standard for "the control of emissions from new motor vehicles," CAA § 209(a), 42 U.S.C. 7543(a), that would be inconsistent with the Clean Air Act's division of federal and state responsibilities. Section 209(a) preempts such standards regardless of the form of the rule imposing the emission control requirement.

2. The district court's conclusion that Section 209(a) does not preempt the Fleet Rules because they "regulate the purchasing and leasing, not the sale, of vehicles by fleet

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[7] The District of Columbia Circuit stated in *MEMA* that the legislative history of the Clean Air Act "indicates that Congress intended the word 'standards' in Section 209 to mean quantitative levels of emissions rather than regulations involving certification or in-use maintenance restrictions." 627 F.2d at 1112. To the extent the court suggested that only a regulation setting out "quantitative levels of emissions" qualifies as a "standard," it spoke too broadly. EPA has drawn a distinction between "standards" and "accompanying enforcement procedures," *ibid.*, but it has made clear that the term "standard" includes both emissions-related criteria and the imposition of such criteria on an identified group of vehicles. See *AIAM*, 208 F.3d at 6-7. The Act itself uses the term in that way, providing that federal emissions regulations shall "contain standards which provide that emissions from a percentage of each manufacturer's sales volume" will meet particular criteria. See CAA 202(g), 42 U.S.C. 7521(g). As the First Circuit pointed out, Section 209(a)'s use of the term "standard" should not be read to exclude state regulation, such as the Fleet Rules, whose "very purpose and effect * * * is to effect a quantitative reduction in emissions." *AIAM*, 208 F.3d at 7 (reconciling *MEMA*).

operators" (Pet. App. 21a) is also without merit. The district court conceded that EPA and the courts of appeals that have addressed the issue have concluded that state regulations requiring that a specified percentage of new vehicles sold within the State have certain emission characteristics "must be considered a standard 'relating to the control of emissions.'" *AIAM*, 208 F.3d at 6; *AAMA*, 152 F.3d at 200. That conclusion is sound. Such "sales requirements," which control emissions from new vehicles by prescribing the number and emission levels of new vehicles that a manufacturer may sell, are inescapably "standard[s] relating to the control of emissions." CAA § 209(a), 42 U.S.C. 7543(a). As EPA explained in response to inquiries from the First Circuit,

> Setting the link between the emission limit and the applicability of the limit to a particular number of vehicles is an inherent part of the standard setting process.

*AIAM*, 208 F.3d at 6 (quoting EPA letter (Sept. 15, 1999)); see *id.* at 3-5 (describing the court's request for EPA's views). There is no basis for concluding that analogous "purchase requirements" that seek to achieve the same end are not likewise preempted.

The district court's distinction is untenable as a textual matter because Section 209(a)'s prohibition of "any standard relating to the control of emissions from new motor vehicles" makes no distinction between state requirements that control new vehicle emissions by regulating what residents buy rather than by regulating what manufacturers produce and sell. Such distinctions would make little sense, because every purchase of a new vehicle results in a sale, and a state regulation that restricts what a resident can purchase correspondingly limits what the manufacturer can produce for sale. Under the district court's illusory distinction, a State could unilaterally subject manufacturers to that



State's own unique regime of new vehicle emission control requirements simply by casting those requirements in terms of what types of vehicles its residents are allowed to buy. Every State would then be free to adopt its own emissions standards, subjecting automobile manufacturers to the very patchwork of varying state regulations that Congress crafted Section 209(a) to avoid.

The district court was also mistaken in distinguishing the Fleet Rules on the basis that they "require purchasers to choose from among a subset of previously [CARB-]certified California vehicles." Pet. App. 23a. The Fleet Rules run afoul of Section 209(a) precisely *because* they require fleet operators to select from only a subset of the vehicles that EPA has authorized CARB to certify for sale in California. For example, the CARB standards allow, but do not require, manufacturers to produce alternative-fueled vehicles. See Cal. Code Regs. tit. 13, § 1956.8 (2003). By contrast, four of the Fleet Rules *require* use of alternative-fueled vehicles, subject to limited exceptions. See Rules 1186.1, 1193, 1194 (as to heavy vehicles), 1196 (J.A. 16, 52, 58, 66). Similarly, CARB's Urban Bus Program allows bus manufacturers to choose between an alternative-fuel path and a diesel path, Cal. Code Regs. tit. 13, § 1956.2 (2003), but Rule 1192 requires that buses purchased for fleets in the SCAQMD be alternative-fueled, and thus narrows CARB's two paths to one. See J.A. 46. While CARB's regulations allow manufacturers flexibility in determining what mix of LEV and ULEV vehicles to produce, Cal. Code Regs. tit. 13, § 1960.1 (2003), Rules 1191 and 1194 compel purchase of specified percentages of those vehicles. See J.A. 24, 58.

The Fleet Rules accordingly impose additional regulatory requirements for the "control of emissions from new motor vehicles" beyond those found in the CARB standards. CAA § 209(a), 42 U.S.C. 7543(a). Section 209(a) preempts state regulation, even state regulation that is consistent with the

Clean Air Act's substantive requirements, so long as it falls within Section 209(a)'s terms. See *Morales*, 504 U.S. at 387; *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 829 (1988). It accordingly prohibits the SCAQMD's unauthorized revision of the CARB rules.[8]

3. The district court also erred in reasoning that Section 246 of the Clean Air Act, 42 U.S.C. 7586, which addresses centrally-fueled vehicle fleets, supports the SCAQMD's claim of authority to promulgate the Fleet Rules. See pp. 5-6, *supra* (discussing the Clean Air Act's "clean-fuel vehicles" provisions). Section 246, which created what is known as the "Clean Fuel Fleet Program" (CFFP), directs certain States to modify their SIPs to include specifically prescribed clean-fuel vehicle fleet provisions. See CAA § 246(a), 42 U.S.C. 7586(a). It reflects Congress's understanding that States do not have a general license to impose emission-based restrictions on fleet vehicle purchases, but instead must regulate fleet vehicle emissions in accordance with Congress's instructions. Congress's imposition of substantial conditions on fleet regulation, see CAA § 246(b)-(h), 42 U.S.C. 7586(b)-(h), indicates that Congress did not believe

[8] Significantly, Section 177 of the Clean Air Act allows other States to follow California's example and adopt EPA-approved CARB standards, provided that "such standards are identical to the [CARB] standards" and the State adopts those standards "at least two years before commencement" of the relevant model year. 42 U.S.C. 7507. Section 177 further provides that States adopting the CARB standards may not "prohibit or limit, directly or indirectly, the manufacture or sale of" the CARB-certified vehicles. The SCAQMD is not a State, and therefore not eligible to invoke Section 177. But even States that are eligible to adopt the CARB standards could not adopt analogues of the Fleet Rules, which are not "identical to" the CARB standards and impose purchase requirements that would "limit, directly or indirectly, the manufacture or sale of" the CARB-certified vehicles. *Ibid.*



that States were already free to regulate emissions from vehicle fleets however they chose.[9]

For example, Section 246(a) requires that States participating in the CFFP program submit their fleet regulation programs to EPA as SIP revisions, which assures federal oversight of the State's regulatory provisions. See CAA § 246(a), 42 U.S.C. 7586(a); see also CAA § 110(k)-(*l*), 42 U.S.C. 7410(k)-(*l*) (setting out the process for EPA approval of SIP revisions). Section 246(b) additionally sets out specific phase-in requirements. 42 U.S.C. 7586(b). Section 246(d) requires States to give fleet operators the choice of what type of fuel to use and what type of vehicle to buy, so long as other congressionally-specified requirements are met. 42 U.S.C. 7586(d). Furthermore, Section 249 sets out a carefully circumscribed program to demonstrate the effectiveness of clean-fuel vehicles. 42 U.S.C. 7589. Congress specifically provided in Section 249(f)(4) that this program could not incorporate any "production *or sales* mandates for clean-fuel vehicles or clean alternative fuels," 42 U.S.C. 7589(f)(4) (emphasis added), signaling that mandatory programs like the Fleet Rules are not within State authority. See also 42 U.S.C. 7590(b) (stating that Part C of Title II does not grant EPA authority to adopt "production [m]andates" or "to specify as applicable the models, lines, or types of, or marketing or price practices, policies, or strategies for, vehicles subject to this part"). And the Clean Air Act elsewhere defines the critical terms. See, *e.g.*, CAA § 241(2) ("clean alternative fuel"), (5) ("covered fleet"), (6) ("covered fleet vehicle"), and (7) ("clean-fuel vehicle"), 42 U.S.C. 7581(2), (5), (6), and (7).

[9] In a similar manner, certain state fuel programs mandated by Congress under Section 211(m) are exempt from the reach of the general preemption provision in Section 211(c)(4)(A). See *Exxon Mobil Corp.* v. *EPA*, 217 F.3d 1246 (9th Cir. 2000).

Section 246 and its allied provisions demonstrate the care with which Congress calibrated the Clean Air Act's provisions balancing federal and state authority over fleet vehicle emissions. That balanced structure cannot be reconciled with a reading of the Act that would allow unlimited and disparate state and local regulation of new fleet vehicle purchases. Contrary to the district court's conclusion, Section 246 and the allied provisions reflect the understanding, set out explicitly in Section 209(a), that the federal government largely occupies the field of establishing emissions criteria that new motor vehicles must meet, and States (and their political subdivisions) may regulate new fleet vehicle purchases only in accordance with EPA's oversight and the Clean Air Act's design.

4. The district court also erred in relying on the general principle that state health and safety regulations "are presumed to be valid." Pet. App. 24a (citing *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 475 (1996)). That general principle must yield to the specific language of the Clean Air Act. Congress expressly recognized, through Section 116, that States generally retain authority to regulate air pollution, but Congress specifically conditioned that principle through the limitations set out in Section 209. See CAA § 116, 42 U.S.C. 7416. Section 209(a), in turn, broadly preempts state standards "relating to the control of emissions from new motor vehicles." 42 U.S.C. 7543(a). That prohibition, by its terms, reaches the SCAQMD's Fleet Rules. The general principle that "state regulations are presumed to be valid" in the absence of countervailing indicia of congressional intent cannot overcome Section 209(a)'s specific provisions preempting the state regulations at issue. See *Morales*, 504 U.S. at 384-385 (a general savings clause is subject to a specific preemption provision).

The Clean Air Act does not leave the SCAQMD without further recourse. The SCAQMD may request the State of



California to seek EPA approval of appropriate rules governing vehicle fleet operations through the avenues that Congress expressly provided. Section 209(b) specifically authorizes EPA to waive Section 209(a)'s prohibition upon satisfaction of the conditions prescribed therein. See 42 U.S.C. 7543(b). In addition, the State of California may be entitled to place restrictions on the types of new public vehicles that the State and its instrumentalities purchase for their own use. See *Building & Constr. Trades Council of Metro. Dist.* v. *Associated Builders & Contractors*, 507 U.S. 218, 231-232 (1993) ("In the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction."). But the court of appeals erred in affirming the district court's resolution of the issue that is now before this Court. Section 209(a) preempts the Fleet Rules because they are "standard[s] relating to the control of emissions from new motor vehicles" and California has neither sought nor received a waiver of Section 209(a)'s prohibition in accordance with Section 209(b). See 42 U.S.C. 7543(a) and (b).

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 2003

Supreme Court, U.S.
FILED
AUG 29 2003
OFFICE OF THE CLERK

No. 02-1343

# In The Supreme Court of the United States

ENGINE MANUFACTURERS ASSOCIATION and WESTERN STATES PETROLEUM ASSOCIATION,

*Petitioners,*

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, et al.,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## JOINT BRIEF OF THE AMERICAN AUTOMOTIVE LEASING ASSOCIATION AND NATIONAL ASSOCIATION OF FLEET ADMINISTRATORS, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS ENGINE MANUFACTURERS ASSOCIATION AND WESTERN STATES PETROLEUM ASSOCIATION

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## INTERESTS OF *AMICI CURIAE*

The American Automotive Leasing Association ("AALA") and the National Association of Fleet Administrators, Inc. ("NAFA") respectfully submit this joint brief in accordance with Supreme Court Rule 37.3.[1] *Amici* do so because the Court's interpretation of the fleet rules at issue ("Fleet Rules") will determine whether the South Coast Air Quality Management District ("SCAQMD") and hundreds of other localities may regulate fleets in a balkanized manner by prohibiting them from purchasing or leasing, on a locality-by-locality basis, vehicles that may otherwise be lawfully acquired.

### A. American Automotive Leasing Association

AALA is a trade association representing the fleet leasing and management industry. The industry owns approximately 3,560,000 of the cars and light-duty vehicles used by businesses throughout the United States. While these vehicles are used predominantly for sales and service functions, the range of commercial and State and local governmental fleet usage is significant.

In contrast to the consumer car leasing business that limits itself to offering the retail public alternative financing, AALA members provide comprehensive fleet consulting and management services to commercial, non-profit, and governmental organizations. The range of services includes:

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[1] The parties consented to the filing of this brief, and copies of the parties' written consents have been filed with the Clerk of the Court. This brief was not authored in any part by counsel for any party, and no persons or entities other than *amici curiae*, its members, and counsel made a monetary contribution toward the preparation or submission of this brief.

(1) selecting and acquiring the most appropriate and cost-effective vehicle for the particular work to be performed;

(2) assisting in operating and maintaining those vehicles safely and economically, including designing and implementing fueling, maintenance, and safety programs, as well as ensuring compliance with State and local registration and operating requirements; and

(3) reclaiming, at the end of the lease, the highest value from the vehicle through auction, public sale, or other disposal.

### B. National Association of Fleet Administrators, Inc.

NAFA members manage fleets of automobiles, light- and medium-duty trucks and/or vans for organizations in the United States and Canada. A substantial number of NAFA members manage vehicles operating in California. The majority of NAFA's members manages fleets for corporations, covering a wide range of manufacturing and service organizations. Some members work for governments (local, State, and federal) or public service entities (law enforcement, educational institutions, utilities, etc.), while others serve financial institutions, insurance companies, non-profit organizations, and the like. The typical NAFA member manages a fleet of approximately 1,200 vehicles. This management responsibility spans each vehicle's life cycle, from acquisition to final disposition.

NAFA's Pacific Southwest Chapter includes the fleet managers for many of the government jurisdictions in the South Coast area of California. NAFA's members include the fleet managers for many of the largest to many of the smallest jurisdictions. NAFA's 2,700 members collectively are directly responsible for managing 2.7 million vehicles.



## STATEMENT OF THE CASE

*Amici* adopt the statement of the Petitioners, except to emphasize a few important facts the Court should consider in reaching its final decision in this case.

The fleet industry possesses several unique attributes that persuaded Congress to establish, in the 1990 amendments to the Clean Air Act, a federal clean-fuel vehicle program that governed how California and other States were to regulate fleets, if they were to be regulated at all. 42 U.S.C. §§ 7401-7671q (2003). That federal program included specific provisions that applied to certain fleets. Congress recognized that fleets could expedite the introduction of clean-fuel vehicles into the market, thereby furthering air quality goals. Congress also understood that those goals would be undermined if State and local governments regulated fleets in a balkanized manner. An appreciation of how fleets operate is thus critical to an analysis of the Fleet Rules.[2]

Fleets come in many sizes and forms. Some are small operations with just a few vehicles while others have tens of thousands of vehicles. Some consist of a mix of vehicle sizes (light-, medium-, and heavy-duty) while others are uniform. Some are owned and operated by government agencies, while others are private. Fleets may be centrally fueled or rely upon public refueling stations. Fleets may consist of either owned or leased vehicles. If the fleet owns

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[2] For EPA's description of the fleet industry in the context of the federal clean-fuel vehicle program, *see generally*, Clean Fuel Fleet Credit Programs, Transportation Control Measure Exceptions, and Related Provisions, 56 Fed. Reg. 50,196 (proposed Oct. 3, 1991) (noting that the fleet industry "is unlike most other regulated industries because the only common thread between [sic] members is the fact that they own and operate fleets of vehicles." *Id.*).

the vehicles, it typically possesses both title and registration, depending upon the nature of the vehicle's financing. If the fleet leases the vehicles, it typically holds registration while the lessor retains title. The fleet owner, operator, or manager may be a customer of a fleet leasing and management firm that provides the vehicles and support services.

The fleet leasing and management industry, which AALA represents, and professional fleet managers, which NAFA represents, share several characteristics that are important here. First, fleets are mobile, not stationary, sources. A vehicle may be in Los Angeles one day and Reno the next.[3] This is particularly the case with larger fleets that operate in interstate commerce. Because their inventory is on the move, fleets face higher costs and operational difficulties if their vehicles are regulated differently by each city in which they do business.[4] Uniformity in regulation is particularly key with respect to vehicle acquisition decisions, the activity which triggers the Fleet Rules. Havoc would result if, for example, Los Angeles compelled a fleet to acquire vehicles that operated on compressed natural gas while Reno mandated that the same fleet only acquire propane-fueled vehicles.

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[3] The vehicle movement that is particularly relevant here is that conducted by the fleet owner/operator in the management of his vehicle stock. The operator, for example, may shift vehicles among geographic areas in response to customer needs or business conditions. If the Fleet Rules are upheld, local governments could regulate these intra-fleet transfers in a conflicting manner.

[4] Clean Fuel Fleet Emission Standards, Conversions, and General Provisions and Amended Heavy-Duty Averaging, Banking and Trading Credit Accounting Regulations, 58 Fed. Reg. 32,474, 32,476 (proposed June 10, 1993) ("the need for uniformity among state programs is very important for fleets operating in more than one state").



Second, fleets provide tangible air quality and fuel economy benefits over general population vehicles because fleets are managed to extract the maximum economic value from each vehicle. Fleets generate environmental and energy benefits in numerous ways, including:

> *Fleet vehicles are better maintained, on average, than general population vehicles.* For economic and other reasons, fleets ensure that vehicles and their subsystems, such as emission control equipment, are properly inspected and maintained. Regular vehicle inspection and maintenance provide numerous benefits, including enhanced safety, improved emission performance, and better fuel economy. Properly maintained vehicles emit less pollution and consume less fuel. In contrast, general population vehicles tend to be poorly maintained, even when they are operated in regions of the country that are subject to Clean Air Act requirements relating to vehicle inspection and maintenance.
>
> *Fleet vehicles are "right-sized."* Vehicle size is an important factor in determining how much fuel a vehicle consumes. Fleets carefully select their vehicles to be no larger than is necessary for the task at hand, in large measure to conserve fuel and thus reduce costs. In contrast, the general population tends to acquire vehicles that may be larger than necessary (such as sport utility vehicles) or without regard to a vehicle's fuel economy.

Local regulations such as the Fleet Rules undermine these benefits by creating an incentive for managed fleets to disband in favor of driver reimbursement programs.

Fleets exist when the economics of vehicle acquisition, operation, maintenance, and disposal dictate that such decisions be made collectively in the form of a fleet. If the economics no longer work because a local regulator tells the fleet what vehicles to acquire, the fleet typically has the option of reconstituting itself as a driver reimbursement program. Employees in driver reimbursement programs use their personal vehicles to conduct company business and the company (or government agency), in turn, reimburses its employees for work-related expenses associated with the vehicles' use (fuel charges, for example). Because driver reimbursement programs rely upon employee-provided vehicles, the environmental and energy benefits previously provided by the managed fleet are lost.

Congress was well aware of these unique attributes of fleets when it enacted the federal clean-fuel vehicle program in 1990. Congress recognized that certain fleets, due to their centralized structure and relatively high inventory turnover, might expedite the introduction of clean-fuel vehicles into the marketplace. That laudable environmental goal would be undermined if State and local governments imposed a patchwork of well-intentioned local vehicle acquisition programs that made it more economical for fleets to convert to driver reimbursement programs.

To address that concern, Congress stipulated that if the States were to regulate fleets' vehicle acquisition decisions, they could do so only by adhering to minimum federal requirements. Congress established those requirements in the Clean Air Act's clean-fuel vehicle program by striking a careful balance among the competing interests of stringent federal controls, fleet autonomy, and State implementation. The Fleet Rules disrupt that balance.



## SUMMARY OF ARGUMENT

Section 246 does not support enactment of the Fleet Rules. Properly construed in the context of the entire federal clean-fuel vehicle program in part C of title II of the Clean Air Act, section 246 instead is a limit on State discretion to regulate fleets. The State of California was aware of this fact when it opted out of section 246 a decade ago and replaced it with a non-fleet substitute program. That opt out undercuts SCAQMD's position that section 246 somehow supports the Fleet Rules.

Federal law makes clear that local efforts to regulate vehicle acquisition decisions by fleets, such as the Fleet Rules, are preempted. This conclusion follows from section 209, the Clean Air Act's express preemption provision, the language and legislative history of which indicate that localities are preempted from dictating to fleets what cars and trucks they may acquire. It also follows from section 246, a provision which separately occupies the field of fleet vehicle acquisition programs and sets national policy that such programs be implemented uniformly.

## ARGUMENT

Petitioners have focused their attention on why the Fleet Rules constitute preempted "standards" under section 209(a) (42 U.S.C. § 7543(a)). *Amici* have lengthy experience with the fleet program provisions under section 246 of the Clean Air Act, 42 U.S.C. § 7586, and so are uniquely positioned to explain why the Fleet Rules are inconsistent with and separately preempted by the Clean Air Act's provisions governing clean-fuel vehicles and fleets.

## I. THE FLEET RULES ARE INCONSISTENT WITH SECTION 246.

The Court of Appeals adopted without comment the District Court's assertion that section 246 suggests congressional support for local regulation of vehicle acquisition decisions by fleets:

> Furthermore, [section 246] expressly recognizes that Fleet Rules[5] must be established in areas with particularly high pollution levels, and authorizes restrictions on the purchase of fleet vehicles to meet clean-air standards. Specifically, section 246 requires that "each state in which there is located all or part of a covered area . . . shall submit . . . a state implementation plan revision . . . to establish a clean-fuel vehicle program for fleets under this section." Section 246 also mandates that "a specified percentage of all new covered fleet vehicles . . . purchased by each covered fleet operator in each covered area shall be clean-fuel vehicles and shall use clean alternative fuels." It is not rational to conclude that the CAA would authorize purchasing restrictions on the one hand, and prohibit them, as a prohibited adoption of a "standard" [under section 209], on the other.

[5] Although the District Court capitalized the term "Fleet Rules," it is unclear if the District Court was referring to SCAQMD's Fleet Rules or to fleet programs generally. As explained below, the Fleet Rules were not and could not have been issued pursuant to section 246 so it would be erroneous to conclude that the provision authorized them, as Respondents now suggest. *See* Respondents' Brief in Opposition to Petition for Certiorari, No. 02-1343 (April 14, 2003), at 4 ("Most significantly for purposes of the instant case, the CAA also authorizes states to adopt clean-fuel vehicle fleet rules, which have the same effect as the Fleet Rules in this case") (citing section 246); *id.* at 16 ("Congress not only foresaw purchase restrictions like these, it affirmatively authorized them") (citing section 246).



*Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 158 F. Supp. 2d 1107, 1118 (C.D. Cal. 2001) (internal citations omitted); *see Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 309 F.3d 550, 551 (9th Cir. 2002) (adopting District Court's reasoning).

This interpretation misconstrues section 246 by neglecting to examine the provision in its statutory context.

### A. Section 246 Is An Integral Part Of The Federal Clean-Fuel Vehicle Program That Was Intended To Prohibit Localities From Regulating Fleet Vehicle Acquisition Decisions In A Non-Uniform Manner.

Section 246 cannot be read in isolation but must be construed in the context of the Clean Air Act. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 542, 549 (2001) (courts "must give meaning to each element" of the law and are "not at liberty to pick and choose which provisions in the legislative scheme" they will consider). Section 246 is part of the Clean Air Act's clean-fuel vehicle program, a statutory scheme that prohibits, not authorizes, localities from regulating fleet vehicle acquisition decisions in a balkanized manner.

Congress enacted the federal clean-fuel vehicle program in the 1990 amendments to the Clean Air Act as part of a new, comprehensive effort to spur the introduction of clean-fuel vehicles into highly polluted areas around the country, including Los Angeles. The federal program is set forth in part C of title II of the Clean Air Act and spans ten statutory sections: sections 241 (Definitions); 242

(Requirements applicable to clean-fuel vehicles); 243 (Standards for light-duty clean-fuel vehicles); 244 (Administration and enforcement as per California standards); 245 (Standards for certain heavy-duty clean-fuel vehicles); 246 (Centrally fueled fleets); 247 (Vehicle conversions); 248 (Federal agency fleets); 249 (California pilot test program); and 250 (General provisions). 42 U.S.C. §§ 7581-7590. Implementing regulations issued by the U.S. Environmental Protection Agency ("EPA") are in part 88 of title 40 of the Code of Federal Regulations.[6] EPA issued separate program guidance in 1998. *Clean Fuel Fleet Program Implementation Guidance* (EPA 420-R-98-011, Aug. 1998).

This federal plan is based upon "clean-fuel vehicles," which Congress defined as vehicles in certain weight classes that EPA had certified to meet specific standards. 42 U.S.C. §§ 7581(7), 7582, 7583, 7585; 40 C.F.R. Part 88 Subpart A.[7] Federally certified clean-fuel vehicles were to be used in two programs: (1) a federally administered Pilot Test Program for the State of California to demonstrate the effectiveness of clean-fuel vehicles in controlling air pollution (42 U.S.C. § 7589; 40 C.F.R. Part 88 Subpart B);[8] and (2) a federally administered Clean Fuel Fleet Program

[6] *See, e.g.*, 40 C.F.R. Part 88 Subpart A (Emission Standards for Clean-Fuel Vehicles), Subpart B (California Pilot Test Program), and Subpart C (Clean-Fuel Fleet Program) (2002).

[7] A current list of EPA-certified clean-fuel vehicles is available at http://www.epa.gov/otaq/cff.htm.

[8] The California Pilot Test Program was a federal mandate for the production, sale and distribution of clean-fuel light-duty vehicles and trucks to ultimate purchasers, including fleets subject to section 246. 42 U.S.C. § 7589(c)(1). The program also required California to make available clean alternative fuels for use in clean-fuel vehicles. *Id.* § 7589(c)(2)(A). Other States could opt into the California Pilot Test Program under certain conditions. *Id.* §§ 7589(f)(1), (4).



("CFFP") under section 246 for certain centrally fueled fleets (42 U.S.C. § 7586; 40 C.F.R. Part 88 Subpart C).

The CFFP is a critical part of the federal clean-fuel vehicle program because it provided a carefully tailored mechanism by which "covered fleets"[9] could be used to spur the introduction of EPA-certified clean-fuel vehicles into "covered areas"[10] that constituted many of the country's most populated regions, including Los Angeles. 42 U.S.C. §§ 7586(a), (b). Subject to limited opt-out rights (discussed further below), the CFFP required States

[9] A "covered fleet" is "10 or more motor vehicles which are owned or operated by a single person." 42 U.S.C. § 7581(5). Congress, and later EPA through regulation, specified (1) how vehicle ownership or control was to be used in the determination of a "covered fleet"; and (2) vehicle types that were exempt, such as vehicles used for law enforcement purposes. *Id.*; 40 C.F.R. § 88.302-94 (definitions of "control" and "owned or operated, leased or otherwise controlled by such person"). A "covered fleet vehicle" was limited to motor vehicles that (1) met EPA certification and related standards; and (2) were in "covered fleets" that were centrally fueled or capable of being centrally fueled. 42 U.S.C. § 7581(6).

[10] A "covered area" is (1) any ozone nonattainment area with a 1980 population of 250,000 or more classified as Serious, Severe or Extreme; and (2) any carbon monoxide nonattainment area with a 1980 population of 250,000 or more and a design value at or above 16.0 parts per million. 42 U.S.C. § 7586(a)(2). In the early 1990s, there were twenty-two "covered areas": (1) SCAQMD; (2) Atlanta; (3) Baltimore; (4) Baton Rouge; (5) Beaumont-Port Arthur; (6) Boston-Lawrence-Worcester; (7) Chicago-Gary-Lake County; (8) Denver-Boulder; (9) El Paso; (10) Greater Connecticut; (11) Houston-Galveston-Brazoria; (12) Milwaukee-Racine; (13) New York-Northern New Jersey-Long Island; (14) Philadelphia-Wilmington-Trenton; (15) Providence; (16) Sacramento Metro; (17) San Diego; (18) San Joaquin Valley; (19) Southeast Desert Modified Air Quality Management District; (20) Springfield (Western Massachusetts); (21) Ventura County; and (22) Washington (District of Columbia). Emission Standards for Clean-Fuel Vehicles and Engines, Requirements for Clean-Fuel Vehicle Conversions, and California Pilot Test Program, 59 Fed. Reg. 50,042, 50,043 (Sept. 30, 1994) (to be codified at 40 C.F.R. pt. 88).

(including California)[11] in which was located all or part of a "covered area" to impose a vehicle acquisition program on "covered fleet operators" through State Implementation Plan ("SIP") revisions. *Id.* § 7586(b); 40 C.F.R. § 88.302-94 (definition of "covered fleet operator"). The CFFP included both light- and heavy-duty vehicles, with the latter typically equipped with diesel engines that operate on diesel fuel. 42 U.S.C. § 7586(b).

The States' section 246 SIPs had to satisfy numerous prescriptive requirements that were spelled out in the Clean Air Act, federal regulations, and EPA's guidance document for the fleet program.[12] For example, the SIPs had to:

- be implemented by the State, not localities such as SCAQMD, through the SIP revision process (42 U.S.C. § 7586(a)(1));
- be vehicle- and fuel-neutral by stipulating that the "choice of clean-fuel vehicles and clean alternative fuels shall be made by the covered fleet operator" (*Id.* at § 7586(d));

[11] Six of the original twenty-two "covered areas" were in California. 59 Fed. Reg. *supra* at 50,043. In addition to California, the twenty-two "covered areas" fell within the following States: (1) Georgia; (2) Maryland; (3) Louisiana; (4) Texas; (5) Massachusetts; (6) New Hampshire; (7) Illinois; (8) Indiana; (9) Colorado; (10) Connecticut; (11) Wisconsin; (12) New Jersey; (13) New York; (14) Delaware; (15) Pennsylvania; (16) Rhode Island; (17) Virginia; and (18) the District of Columbia. *Id.*

[12] Not all aspects of the CFFP were to be implemented through SIPs. Some requirements, such as labels for heavy-duty clean-fuel vehicles, were directly imposed on the States by EPA. 40 C.F.R. § 88.305-94. Congress also directed EPA to issue regulations to "ensure that certain transportation control measures including time-of-day or day-of-week restrictions, and other similar measures that restrict vehicle usage, do not apply to any clean-fuel vehicle that meets the requirements of this section." 42 U.S.C. § 7586(h); 40 C.F.R. § 88.307-94.



- require a specified percentage of "all new covered fleet vehicles . . . purchased by each covered fleet operator in each covered area" to use clean alternative fuels,[13] including but not limited to diesel, when operating in the covered area (*Id.* at § 7586(b));
- provide maximum flexibility to fleet operators by, for example, "taking into consideration operational range, specialty uses, vehicle and fuel availability, costs, safety, resale value of vehicles and equipment and other relevant factors" (*Id.* at § 7586(a)(4));
- take "all measures necessary" to make the program "economic from the standpoint of vehicle owners" (*Id.* at § 7511a(c)(4)(A));
- require fuel providers "to make clean alternative fuel available to covered fleet operators at locations at which covered fleet vehicles are centrally fueled" (*Id.* at § 7586(e));
- include a credit program for fleet operators (*Id.* at § 7586(f); 40 C.F.R. § 88.304-94);
- allow covered fleet operators to satisfy regulatory requirements through vehicle conversions (42 U.S.C. § 7587; 40 C.F.R. § 88.306-94); and

[13] Congress defined "clean alternative fuel," in part, as "any fuel (including methanol, ethanol, or other alcohols (including any mixture thereof containing 85 percent or more by volume of such alcohol with gasoline or other fuels), reformulated gasoline, **diesel**, natural gas, liquefied petroleum gas, and hydrogen) or power source (including electricity) used in a clean-fuel vehicle. . . . " 42 U.S.C. § 7581(2) (emphasis added).

- satisfy percentage vehicle acquisition requirements, by model year (42 U.S.C. § 7586(b)).[14]

In a few instances, EPA granted the States discretion to implement the federal program in a manner to meet local needs. For example, EPA allowed the States to grant compliance exemptions in situations where the fleet operator was unable to acquire the necessary vehicles. These limited grants of federal discretion did not touch upon core program considerations, such as vehicle- and fuel-neutrality, that were dictated by federal law. EPA viewed the limited amount of State flexibility under the federal scheme as important but necessarily narrow in scope.[15]

Against the backdrop of part C of title II of the Clean Air Act, section 246 cannot logically be read to reflect congressional support for the Fleet Rules. *Engine Mfrs. Ass'n*, 309 F.3d at 551. For example, section 246 is inextricably linked to federal "clean-fuel vehicles." The Fleet Rules have nothing to do with "clean-fuel vehicles." 42 U.S.C. § 7581(7).

In the State of California, section 246 is also tied to the California Pilot Test Program under section 249, a

[14] The CFFP was supposed to begin in model year 1998. 42 U.S.C. § 7586(b). EPA subsequently delayed the implementation date to model year 1999 due to vehicle availability issues. Clean Fuel Fleet Programs, 63 Fed. Reg. 20,103 (April 23, 1998) (to be codified at 40 C.F.R. pt. 88).

[15] *See Clean Fuel Fleet Program Implementation Guidance*, at 4 (EPA 420-R-98-011, Aug. 1998) ("EPA's interpretation allowing this narrow and limited use of state discretion with regard to compliance exemptions is applicable to only Section 246(a)(4)"); 58 Fed. Reg. *supra* at 32,476 ("after careful consideration of . . . relevant CAA provisions, EPA agrees with the concerned parties that regulations governing key program definitions are necessary for the effective and efficient implementation of the fleet program").



separate initiative to provide California fleets with sufficient quantities of clean-fuel vehicles, including certified cars and trucks operating on diesel fuel. 42 U.S.C. § 7589. By limiting vehicle choice through prohibitions on the acquisition of diesel vehicles, Fleet Rules flatly contradict the purpose of section 249.

Even if section 246 could rationally be read out of context from part C of title II of the Clean Air Act, Respondents have conveniently avoided the many requirements of section 246 that the Fleet Rules contradict, most notably the provision's requirement that fleet programs be vehicle- and fuel-neutral. It is true that Congress authorized fleet programs in section 246. Congress did so, however, in a prescriptive manner that stipulates in almost excruciating detail how the States and specific localities within those States, including the SCAQMD, could regulate fleet vehicle acquisition decisions. Read in full, section 246 is a limit on local fleet regulation rather than a grant of unfettered regulatory authority to the SCAQMD.

### B. The Fleet Rules' Reliance On Section 246 Is Undermined By The State Of California's Decision To Opt Out Of The Section 246 Fleet Program.

The Clean Air Act gave the States, including California, the right to opt out of the CFFP and replace it with a substitute program, subject to federal approval. 42 U.S.C. § 7511a(c)(4)(B). In addition to being contingent upon federal approval, substitute programs had to meet a two-prong test. First, they had to consist "exclusively of provisions other than those required under this chapter for the area"; and second, they had to achieve, in EPA's judgment, emission reductions equivalent to those that would have been generated by the federal clean-fuel vehicle program. *Id.* Because the CFFP program was separately required to

be implemented in the SCAQMD, the first prong of this two-part test prohibited California from electing, as a substitute for the CFFP, a fleet program such as the Fleet Rules that failed to conform to the federal scheme.[16]

California exercised its opt-out rights and thus never submitted a CFFP SIP under section 246.[17] California elected to use its Low Emission Vehicle ("LEV") regulations as the substitute program. The LEV program was an acceptable substitute because it satisfied the opt-out provision's two-prong test. *Id.* In particular, the LEV program was not otherwise required to be implemented in California under the Clean Air Act. *Id.*

This history casts the SCAQMD's reliance on section 246 in this case in an entirely different light. Congress did not merely, as Respondents suggest, authorize the States

[16] The opt-out provision appears in the section of the Clean Air Act dealing with general SIP requirements. 42 U.S.C. §§ 7511a(c)(4)(B), (d), (e). The provision indicates that States may opt out of "all or a portion of the clean-fuel vehicle program prescribed under part C of subchapter II" which includes the California Pilot Test Program and the CFFP. 42 U.S.C. § 7511a(c)(4)(B). The "portion of" language should not be construed to allow States to dismantle the carefully prescribed federal fleet program in section 246 by selectively implementing only those elements that appeal to them. The opt-out provision does not refer to "all or a portion of the clean-fuel fleet program in section 246," and given the numerous restrictions that Congress built into the section 246 program, it would be irrational to interpret the opt-out authority to allow that outcome. *Lorillard Tobacco Co.*, 533 U.S. at 542. In any event, when California sought federal approval of its decision to opt out of section 246, the State informed EPA that it was opting out of the entire provision, not a portion of it. It thus is too late in the day for SCAQMD to claim that the opt-out provision somehow authorizes its Fleet Rules.

[17] Conditional Approval of California's Substitute Program for the Clean-Fuel Fleet Program, 58 Fed. Reg. 62,532 (Nov. 29, 1993) (to be codified at 40 C.F.R. pt. 52).



to regulate fleets in an open-ended manner (*Engine Mfrs. Ass'n*, 309 F.3d at 551). Congress instead gave the States a choice – either regulate fleets in the manner prescribed by section 246, or implement a substitute program consistent with the restrictions provided by the Clean Air Act's opt-out provision. 42 U.S.C. § 7511a(c)(4)(B). California chose the latter course a decade ago when it pledged to EPA that the State would implement its LEV regulations in lieu of section 246.[18] The Fleet Rules are not part of the LEV program and SCAQMD was, and is, bound by California's choice. Given that background, SCAQMD's reliance on section 246 to defend its Fleet Rules is ironic.

In upholding the Fleet Rules, the Court of Appeals effectively allowed California to negate its opt-out commitment to EPA. The Clean Air Act does not authorize the States, let alone localities such as the SCAQMD that are regulated under section 246, to change their opt-out decision without federal oversight. Because they are the product of a unilateral decision by a locality that circumvents the federal approval process for substitute programs that Congress established for fleet vehicle acquisition programs under section 246, the Fleet Rules are unauthorized under, not supported by, the Clean Air Act.

### C. The Fleet Rules Render Section 246 Meaningless.

Respondents' interpretation of section 246 is erroneous because it would allow localities (including the

[18] When it sought EPA approval of the LEV program as a substitute for the CFFP under section 246, California even discussed how its decision would impact the SCAQMD. Conditional Approval of California's Substitute Program for the Clean-Fuel Fleet Program, 58 Fed. Reg. 27,253, 27,255 (proposed May 7, 1993).

SCAQMD) that were specifically regulated under that provision to implement a fleet program that conflicts with section 246. That outcome renders the provision meaningless. *Duncan v. Walker*, 533 U.S. 167, 173 (2001).

Surely if Congress had intended to allow the SCAQMD to regulate fleets in a manner that conflicts with section 246, Congress would have said so explicitly because such a result would have marked a striking departure from the carefully crafted federal clean-fuel vehicle scheme under part C of title II of the Clean Air Act. The failure of Congress, either in statutory language or legislative history, to say anything in support of local enactment of rogue fleet programs such as the Fleet Rules reveals Respondents' interpretation of section 246 to be flawed. *Chisom v. Roemer*, 501 U.S. 380, 396 (1991).

## II. SECTION 209 EXPRESSLY PREEMPTS STATE AND LOCAL REGULATION OF VEHICLE ACQUISITION DECISIONS BY FLEETS.

The Fleet Rules must satisfy the Supremacy Clause of the United States Constitution, which commands that Federal laws "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2. Federal preemption may be either express or implied (*Lorillard Tobacco Co.*, 533 U.S. at 540-541), and local ordinances are analyzed the same as state laws (*Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 (1991)). When assessing whether a local enactment is preempted, the courts are "not at liberty to pick and choose which provisions in the [federal] legislative scheme" they will consider, but instead must examine the federal law as a whole. *Lorillard Tobacco Co.*, 533 U.S. at 549.

Two subsections of section 209, the relevant express preemption provision, are at issue here:



> (a) No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment . . .
>
> (d) Nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles.

42 U.S.C. § 7543(a), (d).

Faced with these provisions, the District Court only analyzed the first sentence of subsection (a) and concluded that it merely preempts local "standards" that have an impact on auto manufacturers. "Where a state regulation does not compel manufacturers to meet a new emissions limit, but rather affects the purchase of vehicles, as the Fleet Rules do, that regulation is not a standard" that is preempted under section 209. *Engine Mfrs. Ass'n*, 158 F. Supp. 2d at 1118. The District Court effectively rewrote the first sentence of section 209(a) to read: "No State or any political subdivision thereof shall adopt or attempt to enforce any standard (i) relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part **and (ii) imposing a burden on manufacturers of the same**" (emphasis added). This

judicial rewrite of section 209 was also adopted by the Court of Appeals.

The lower courts erred in grafting a "manufacturer-protection" limit onto the first sentence of section 209(a). First and foremost, that is not what the sentence says. The focus of that sentence is on State and local requirements without regard to the entity that is regulated. It expressly preempts State and local actions that constitute "standard[s] relating to the control of emissions" from new motor vehicles or engines that are "subject to this part." The term "manufacturer" appears nowhere in section 209, let alone the first sentence. Congress provided a definition of "manufacturer" in section 216 (42 U.S.C. § 7550(1)) and indicated the provisions of title II to which that definition applied (sections 202, 203, 206, 207, and 208), notably excluding section 209. If Congress had intended the term "manufacturer" to be included or otherwise read into section 209, it presumably would have said so. *Chisom*, 501 U.S. at 396.

Reading section 209(a) narrowly to limit federal preemption to local regulations that impact manufacturers alone also places the subsection at odds with the remainder of the provision. Section 209(d), for example, preserves the authority of State and local governments to regulate the "use, operation, or movement" of registered or licensed motor vehicles. Regulations pertaining to the "use, operation, and movement" of motor vehicles impose burdens on vehicle purchasers, owners, and lessors, not manufacturers. If section 209(a) is limited to regulations that only burden manufacturers, section 209(d) is rendered null. *Duncan*, 533 U.S. at 173-174. Section 209(d) only has meaning if section 209(a) preempts local regulations such as the Fleets that prohibit vehicle users from purchasing



or leasing vehicles that may otherwise be lawfully required.[19]

The legislative history confirms that Congress intended vehicle users such as fleets to fall within the scope of section 209. Section 209 has its roots in the 1965 National Emission Standards Act, which authorized the federal Department of Health & Human Services to set national emission standards for new motor vehicles. The 1965 law was passed in response to efforts by California and other States to regulate new motor vehicle emissions.

[19] This interpretation of section 209(d) is consistent with the reasoning of *Metro Systems Corp. v. City of New York*, No. 78 Civ. 6146, 1979 U.S. Dist. LEXIS 14837 (S.D.N.Y. Jan. 26, 1979) and *Allway Taxi, Inc. v. City of New York*, 340 F. Supp. 1120 (S.D.N.Y.), *aff'd*, 468 F.2d 624 (2d Cir. 1972), two cases which upheld municipal taxi ordinances that required vehicles to meet certain air pollution standards. The *Metro Systems* court noted that the challenged regulations "only [took] effect subsequent to and apart from the initial, all-encompassing licensing scheme of the State of New York." 1979 U.S. Dist. LEXIS 14837, at *14. Likewise, the *Allway Taxi* court cautioned that the imposition of State emission standards immediately after a new car is acquired and registered "would be an obvious circumvention of the Clean Air Act and would defeat the Congressional purpose" behind section 209. *Allway Taxi*, 340 F. Supp. at 1124. *Metro Systems* and *Allway Taxi* support the uncontested proposition that section 209 does not prohibit States from imposing certain in-use requirements on motor vehicles at some point after the new vehicle is originally sold or leased to the user.

In a legal opinion issued in 1972, just a few years after section 209 was enacted, EPA's General Counsel similarly concluded that a State vehicle regulation would only survive preemption if "**a reasonable time following initial retail sale** (e.g., one year after such sale or upon second sale, second titling, or second registration)" had passed before the regulation took effect. U.S. EPA, General Counsel Opinion, "Transportation Control Plans" (Aug. 11, 1972) (emphasis added). The Fleet Rules, which prohibit fleets from acquiring new vehicles in the first instance, do not pass this test of reasonableness.

When considering the 1965 law, the Senate Committee on Public Works stated that "it would be more desirable to have national standards rather than for each State to have a variation in standards and requirements which could result in chaos insofar as manufacturers, dealers, **and users** are concerned." S. Rep. No. 89-192, at 6 (1965) (emphasis added). The Committee offered the hope that "individual States will accept national standards rather than additionally impose restrictions which might cause undue and unnecessary expense **to the user**." *Id.* at 8 (emphasis added). Although the 1965 Act did not contain a preemption provision, it also did not contain an express authorization for California to continue down the path of a separate regulatory scheme. *See* David P. Currie, *Motor Vehicle Air Pollution: State Authority and Federal Preemption,* 68 Mich. L. Rev. 1083, 1087 (1970) (hereinafter "*Motor Vehicle Air Pollution*") ("Although the pre-emption provision was not enacted until 1967, the 1965 history is pertinent, since several individuals indicated concern at that time with the pre-emption problem").

Between 1965 and 1967, several States continued to enact legislation related to vehicle emissions. Congress responded to these efforts by enacting the 1967 Air Quality Act. The 1967 Act included the identical language that appears in sections 209(a) and (d) today (then sections 208(a) and (c)). The preemption language emerged following hearings by a subcommittee of the Senate Public Works Committee that dealt with the "automotive problem alone." *Motor Vehicle Air Pollution*, at 1089. Because the hearings focused on vehicle manufacturers, it is little surprise that the legislative history reflects an emphasis on their concerns.

Manufacturers were not Congress' exclusive concern in 1967 when it enacted the relevant provisions of section 209, however. Congress enacted section 209(d) (then section 208(c)) at the same time, a provision which, as



explained above, affects vehicle users such as fleets, not manufacturers. Congress intended both vehicle users and manufacturers to fall within the scope of section 209. *See* H. Rep. No. 90-728 (1967), reprinted in 1967 U.S.C.C.A.N. 1938, 1955-56 (noting that federal preemption is necessary to preclude "chaos" to vehicle users).[20]

The legislative history thus does not support an interpretation of section 209 that somehow limits that provision's reach to matters involving manufacturers. Congress specifically and repeatedly referred to vehicle "users," a class of persons that implicitly if not explicitly excludes manufacturers. Because fleets "use" vehicles, it is clear that Congress intended section 209 to cover fleets as well.

The legislative record takes on added significance here because local, not State, regulation is involved. Congress plainly was worried that vehicle users such as fleets would face different and costly standards if the scope of federal and State responsibilities was not carefully defined. Surely if Congress was worried about conflicting vehicle user

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[20] Upon review of these and other legislative materials, a member of the Illinois Air Pollution Control Board wrote that section 209 was enacted:

> to protect the manufacturer against having to build engines which would comply with a multiplicity of standards (Senator Muskie); **to protect the vehicle owner from having to deal with different standards in each state in which he drives** (Senator Muskie); to avoid the unnecessary duplication of federal standards ([HEW Deputy] Undersecretary Coston); **to avoid "unnecessary expense" to the owner** (the Senate Public Works Committee); and generally to avoid "chaos" and "confusion" (Thomas Mann [of the AMA], Undersecretary Coston, and the Senate Public Works Committee).

*Motor Vehicle Air Pollution,* at 1090-91 (emphasis added).

requirements at the State level, it also was worried about conflicting requirements at the local level. Against that record, it strains credibility to believe that the Fleet Rules, which allow a local government to dictate to fleets what vehicles they may acquire, are somehow consistent with the legislative history of section 209.

## III. SECTION 246 SEPARATELY PREEMPTS THE FLEET RULES ON IMPLIED PREEMPTION GROUNDS.

In a one-sentence footnote, the Court of Appeals declined to consider whether section 246 separately preempts the Fleet Rules on implied preemption grounds, considerations that *amici* raised in their brief below. *Engine Mfrs. Ass'n*, 309 F.3d at 551 n.1. The Court of Appeals did so in reliance on *Swan v. Peterson*, 6 F.3d 1373, 1383 (9th Cir. 1993), *cert. denied*, 513 U.S. 985 (1994) for the proposition that courts generally will not consider arguments raised on appeal only by *amici*.

The Court of Appeals erred in declining to consider *amici*'s implied preemption arguments. "When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991). The meaning and application of section 246 are at issue in this case, and thus *amici*'s arguments (1) were properly before the Court of Appeals, and (2) are properly before the Court.[21]

[21] *Amici*'s position is unlike that of *amici* in *New Jersey v. New York*, 523 U.S. 767, 781 n.3 (1998) There, *amici* took positions that the party which they were supporting had essentially renounced. Petitioners here have not renounced *amici*'s interpretation of section 246.

(Continued on following page)



The District Court discussed the relationship between section 209 and 246 when assessing whether the Fleet Rules were preempted. Respondents similarly seek to justify the Fleet Rules on the theory that section 246 limits the scope of express preemption under section 209. *See* note 5, *supra*. *Amici* thus are not raising novel claims that are tangential to the Court's resolution of whether section 209, alone or in conjunction with section 246, preempts the Fleet Rules. *Amici* instead seek to bring to the Court's attention legal claims that are intimately related to those already at issue – namely, that section 246 does not limit express preemption under section 209, but instead separately and independently preempts the Fleet Rules on implied preemption grounds.

### A. Congress Occupied The Field Of Fleet Vehicle Acquisition Programs.

A State or local law is preempted if the "scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *accord City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973). The analysis turns on the "peculiarities and special features of the federal regulatory scheme in question." *City of Burbank*, 411 U.S. at 638. Even if the local control is "deep-seated in

Moreover, unlike *amici* here, *amici* in *New Jersey* sought to overturn Court precedent and raised matters that were not in controversy. Finally, *Swan v. Peterson* grants the Court of Appeals discretion to consider *amici*'s arguments because they touch upon issues of federalism and are purely legal. *Swan*, 6 F.3d at 1383.

the police power of the States," it is preempted in the face of a pervasive federal scheme. *Id.*

The pervasive nature of the federal clean-fuel vehicle program (including section 246) reveals a congressional intent to occupy the field of fleet vehicle acquisition programs of the type at issue here. In section 246, for example, Congress specified, in part: (1) the geographic locations where fleets were to be regulated (specifically including the SCAQMD); (2) the type and size of fleets that were to be regulated; (3) the type and quantities of vehicles those fleets were to acquire; and (4) the type of fuels, including diesel, that would qualify for the program. 42 U.S.C. § 7586. For States such as California that elected to opt out of the section 246 program, Congress carefully limited that choice by (1) subjecting the State's opt-out decision to federal approval, and (2) prohibiting local enactment of rogue fleet programs as a substitute for section 246. *Id.* § 7511a(c)(4)(B).

The Fleet Rules intrude upon and contradict this pervasive federal scheme. They are not authorized under section 246 and conflict with the provision's procedural and substantive requirements. They are not part of the LEV program, California's EPA-approved substitute for the section 246 program. They were never reviewed or approved by EPA, contrary to the congressional requirement that all section 246 substitute programs be approved by federal authorities.

It is too late in the day for Respondents to defend the Fleet Rules on the theory that they are shielded from field preemption because they are based upon California's police powers or SCAQMD's pioneering role in air pollution matters. *Amici* do not question the leading role that California and SCAQMD have played in air quality issues over the years. However, that history is irrelevant here in light of the fact that Congress occupied the field of fleet



vehicle acquisition programs no later than 1990, when section 246 and the other provisions of the federal clean-fuel vehicle program became law.[22] Additionally, this case deals with mobile sources, an area where the federal interest dominates over State and local concerns. *City of Burbank*, 411 U.S. at 639.[23]

The fact that Congress occupied the field of fleet vehicles acquisition programs no later than 1990 is consistent with the continuing expansion of federal power over local air quality matters. With each subsequent amendment of the Clean Air Act, for example, Congress advanced further into State and local matters.[24] That accretion of federal power largely explains why the Clean Air Act has become the most complex environmental law ever enacted.

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[22] Any pre-1990 State of California legislation that purports to authorize the Fleet Rules would itself be preempted.

[23] Similarly, in congressional testimony in 1964, Warren Dorn of the Air Pollution Control Board, Los Angeles County Board of Supervisors, revealed that he wrote to the President of the United States to argue for greater Federal oversight of mobile sources because "neither the county of Los Angeles nor any other agency of local government has the legal authority" to adequately address air pollution from mobile sources. Hearings Before a Special Subcommittee on Air & Water Pollution, 88th Cong., at 23 (1964). This statement by a key local regulator undermines Respondents' assertion that the SCAQMD has historically regulated mobile sources.

[24] Vehicle inspection & maintenance ("I/M") programs provide a relevant example. I/M programs require vehicles to be inspected to ensure, among other things, that their emission control systems are functioning properly. An I/M program is a classic example of a local program that regulates the "use, operation, or movement" of motor vehicles, a subject matter that Congress reserved to localities in 1967 when section 209(d) was enacted. Since that time, Congress has hardly treated I/M programs as a matter of exclusive local control that is exempt from federal reach. Just the opposite is true. *See, e.g.*, 42 U.S.C. § 7511a(c)(3) (federal imposition of "enhanced I/M" requirements on State and local authorities).

Against that backdrop, the Court should treat with skepticism Respondents' claims that there is something inherently "local" about fleet programs that places them outside the realm of federal control.

### B. The Fleet Rules Undermine Federal Policy That Fleet Vehicle Acquisition Decisions Be Regulated Uniformly.

A local enactment is preempted if it conflicts with the federal scheme. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869-74 (2000). Conflict preemption exists when a local ordinance "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Congress' purpose in establishing the section 246 program was to ensure that fleets were regulated uniformly throughout the country.[25]

The Fleet Rules, which stand for the proposition that local governments are free to regulate vehicle acquisition decisions by fleets in a manner that conflicts with the federal scheme, undermine that purpose. Indeed, under Respondents' interpretation of the Clean Air Act, cities throughout the United States could regulate the same fleet differently, a situation that would lead to untenable results and contravene the careful policy choices regarding fleets that Congress set forth in part C of title II of the Clean Air Act.

The Court has not hesitated to strike down local enactments that "aim[ ] precisely at the same ends" as the

[25] Clean Fuel Fleet Emission Standards, Conversions, and General Provisions and Amended Heavy-Duty Averaging, Banking and Trading Credit Accounting Regulations, 58 Fed. Reg. 32,474 (proposed June 10, 1993).



relevant federal law. *Ray*, 435 U.S. at 165. Here, both Congress and SCAQMD seek to spur the introduction of cleaner-burning vehicles by imposing vehicle acquisition requirements on fleets. SCAQMD does so, however, in a manner that "[r]efuse[s] to accept the federal judgment" about how that task was to be accomplished. *Id.* In *Ray*, the Court was troubled by the fact that the State of Washington sought to exclude from Puget Sound vessels that the federal government had otherwise certified for that use, and thus found those and related aspects of the State law to be preempted. *Id.* Similarly here, the SCAQMD (1) prohibits fleets from acquiring vehicles that meet all other applicable federal standards, and (2) regulates fleets in a manner that violates section 246. Because the Fleet Rules thus conflict with the approach for fleet regulation set forth by Congress, they are preempted.

## CONCLUSION

The decision of the Court of Appeals should be reversed because the Fleet Rules are expressly preempted by section 209, a provision that shields fleets from local regulation of their vehicle acquisition decisions. Nothing in section 246 limits the scope of federal preemption of the Fleet Rules or supports their enactment. The Fleet Rules instead violate section 246's prescriptive procedural and substantive requirements.

Alternatively, the decision of the Court of Appeals should be remanded to address why section 246 separately preempts the Fleet Rules on implied preemption grounds. In enacting section 246, Congress occupied the field of vehicle acquisition programs for fleets. The Fleet Rules

intrude upon that domain and frustrate federal policy that fleets be regulated uniformly, if at all.

Respectfully submitted,

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August 29, 2003

Supreme Court, U.S.
FILED
AUG 29 2003
OFFICE OF THE CLERK

No. 02-1343

IN THE
# Supreme Court of the United States

ENGINE MANUFACTURERS ASSOCIATION AND WESTERN STATES PETROLEUM ASSOCIATION,

*Petitioners,*

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, ET AL.,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF ALLIANCE OF AUTOMOBILE MANUFACTURERS, AMERICAN PETROLEUM INSTITUTE, ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, CALIFORNIA MOTOR CAR DEALERS ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL AUTOMOBILE DEALERS ASSOCIATION, NATIONAL PETROCHEMICAL AND REFINERS ASSOCIATION, AND TRUCK MANUFACTURERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

Whether local government regulations prohibiting the purchase of new motor vehicles with specified emission characteristics—which are otherwise approved for sale by state and federal regulators—are preempted by the Clean Air Act, which expressly preempts any state or local "standard relating to the control of emissions from new motor vehicles." 42 U.S.C. § 7543(a).

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## INTERESTS OF *AMICI CURIAE*

The Alliance of Automobile Manufacturers, the American Petroleum Institute, the Association of International Automobile Manufacturers, the California Motor Car Dealers Association, the National Association of Manufacturers, the National Automobile Dealers Association, the National Petrochemical and Refiners Association, and the Truck Manufacturers Association respectfully submit this joint brief as *amici curiae* in accordance with Supreme Court Rule 37.3.[1]

*Amici* represent the automobile manufacturers and dealers that manufacture and distribute virtually every vehicle sold in the United States, as well as the energy companies that produce and market the petroleum products used in most of those vehicles.[2] Vehicles and fuels sold in this country are subject to comprehensive emission control regulation by the U.S. Environmental Protection Agency ("EPA" or "the Agency") under title II of the Clean Air Act,

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[1] The parties consented to the filing of this brief, and copies of the parties' written consents have been filed with the Clerk of the Court. This brief was not authored in any part by counsel for any party, and no persons or entities other than *amici curiae*, its members, and counsel made a monetary contribution toward the preparation or submission of this brief.

[2] The Alliance of Automobile Manufacturers, the Association of International Automobile Manufacturers, and the Truck Manufacturers Association represent manufacturers and distributors of new passenger cars and trucks located in the United States and overseas. The California Motor Car Dealers Association and the National Automobile Dealers Association represent new vehicle dealers in California and other parts of the United States. The American Petroleum Institute and the National Petrochemical and Refiners Association represent companies engaged in all segments of the U.S. petroleum industry, and the National Association of Manufacturers represents a broad group of industrial companies and member organizations serving U.S. manufacturers.

as amended, 42 U.S.C. §§ 7521-7590. EPA sets performance standards for vehicles and fuels that leave to industry engineers the choice of specific engine designs and fuel specifications needed to reduce emissions.

EPA's technology-neutral regulations flow from the Clean Air Act, which requires stringent emissions control while considering costs and other factors. The Agency's rules thus reward innovation while also protecting the environment. Its rules over three decades have required increasing reductions in smog-forming emissions from new gasoline vehicles, including light-duty trucks and sport-utility vehicles, so that today's emissions are a small percentage of the emissions from uncontrolled vehicles.[3] EPA's regulations for gasoline-powered vehicles in the coming years are so stringent that there is no longer any significant difference between the federal rules and those in California, even though California has in the past led the nation's effort to lower automotive emission levels. For over 35 years manufacturers have met these ever-tightening performance standards from EPA and California, and manufacturers have relied upon the Clean Air Act and the well-settled national policy that only EPA and California may set such standards.

Many heavy-duty trucks operate on diesel fuel, rather than gasoline. EPA has adopted rules that regulate new heavy-duty vehicles, along with their fuel, as a system. As with its other automotive air pollution rules, EPA's heavy-duty vehicle standards leave the choice of specific technologies to the engineers employed or sponsored by the members of *amici*. The targets are ambitious. The heavy-duty new-vehicle regulations adopted by EPA in December 2000 are expected to reduce emissions from diesel-powered

[3] *See* 65 Fed. Reg. 6,698 (Feb. 10, 2000) (final rule for model year 2004 and later new passenger cars and light-duty trucks).



trucks and buses by 95 percent.[4] When combined with the upcoming rules for other new vehicles, the requirements for new heavy-duty trucks sold outside California are virtually the same as the rules for new trucks sold inside California.

This case involves a set of regulations that are inconsistent with the coordinated national and California strategy to reduce automotive air pollution through performance-based rules. The regulations at issue, the Fleet Rules adopted by the South Coast Air Quality Management District ("SCAQMD"), ban some of the nation's cleanest advanced technology vehicles from several important markets in southern California. Those markets involve specified public and private fleets of 15 or more vehicles.[5]

SCAQMD's rules were apparently premised on a belief that vehicles designed to use natural-gas and other alternative fuels would be inherently cleaner than gasoline- or diesel-powered vehicles. That technological assumption is already obsolete. Gasoline- and diesel-powered vehicles produced by *amici's* members can achieve the same emission levels as natural-gas vehicles. But they are shut out of the fleet markets governed by SCAQMD's rule, and competition between different fuels and technologies has been stifled.

The interests of *amici* extend well beyond the immediate impact of the Fleet Rules. For more than 35 years, section 209 of the Clean Air Act has prohibited local emissions control of the new-vehicle market. Congress has assigned environmental regulation of new motor vehicles to EPA, with an exception for the State of California, which is allowed to enforce its own rules if those rules have been reviewed and approved by EPA. EPA's coordination and

[4] *See* 66 Fed. Reg. 5,002, 5,005 (Jan. 18, 2001).

[5] *See* Petitioners' Opening Brief at 14-17 (description of Fleet Rules).

supervision is critical if the nation is to reduce automotive air pollution in a cost-effective manner and with minimum disruption of an international industry.

The Fleet Rules thus violate basic principles of technological innovation and fuel neutrality. Putting aside the merits of the Fleet Rules, however, the process initiated by SCAQMD has serious national consequences. If other localities also try to establish their own rules by picking and choosing the technologies and fuels that may be purchased, the rules that govern the members of *amici* would no longer be a coordinated national program. Those requirements instead would be the end product of disconnected technology and fuel choices made by local authorities.

As SCAQMD would interpret federal law, there is no federal impediment to the City of Santa Monica, the Berkeley City Council, or any other city, dictating which new vehicles may be purchased in those jurisdictions. That outcome would be directly contrary to what Congress envisioned when it enacted title II of the Clean Air Act and is specifically prohibited by section 209. A similar adverse impact could occur to diesel fuel providers, who, after investing heavily in the technology to produce clean fuel ,may see their potential markets lost because of local bans on the purchase of diesel-powered vehicles.

## SUMMARY OF ARGUMENT

Section 209(a) of the Clean Air Act prohibits the regulation of emissions from new motor vehicles by state and local governments. Only the State of California is allowed to adopt emissions control rules for new vehicles that differ from those of EPA. Before California can enforce its own rules, however, it must obtain EPA's concurrence that its rules meet criteria specified in section 209(b) of the Act, 42 U.S.C. § 7543(b), which include considerations of cost and lead-time.



The state agency in California charged with adopting rules is the California Air Resources Board (or "CARB"). Rules adopted by CARB acquire their exemption from federal preemption only by virtue of EPA's review and approval under section 209(b). The Clean Air Act does not permit state or local emissions control requirements for new vehicles that EPA has not considered and approved. 42 U.S.C. § 7543(a). Instead, states and localities are permitted to regulate the "use, operation, or movement" of registered or licensed vehicles. *Id.* § 7543(d).

Within the last five years, the standards for new vehicles adopted by CARB for the State of California and by EPA for the nation as a whole have converged. Both EPA and CARB regulations permit manufacturers to use a variety of designs to meet the same or similar performance standards. To ensure that the vehicles will achieve low pollution levels, EPA and CARB also strictly control the composition of gasoline and diesel fuel. Vehicles and fuels are thus regulated comprehensively by EPA and CARB as a system.

The Fleet Rules differ from the rules adopted by CARB and EPA, primarily because they ban gasoline- and diesel-powered vehicles from several important markets for new vehicles, without regard to whether such vehicles can in fact meet the same emission levels as "alternative" vehicles. Most important from a statutory perspective, *no officer or entity representing the State of California has submitted the Fleet Rules to EPA for review, and the Fleet Rules have not received a waiver of federal preemption under section 209(b).*

The Fleet Rules are therefore expressly preempted from enforcement by section 209 of the Clean Air Act. In addition, the Fleet Rules grate against the basic strategy of technology- and fuel-neutral emissions regulation developed by EPA, and upset the balance between stringency and cost control required by the Clean Air Act. Because they are also

not consistent with the Clean Air Act, with federal regulations and with the CARB rules approved by EPA for the State of California, the Fleet Rules accordingly are subject to conflict preemption under the principles of *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), *Gade v. Nat'l Solid Wastes Mgmt. Ass'n,* 505 U.S. 88 (1992) , and *Hines v. Davidowitz,* 312 U.S. 52 (1941).

## ARGUMENT

Petitioners have fully explained the application of section 209(a) to the Fleet Rules. *Amici* believe it is also important to examine the Fleet Rules in light of the overall structure of title II, and how the decisions of the courts below would adversely affect the nation's ability to meet the objectives of Congress in providing for federal control of new vehicle emissions regulation under the Clean Air Act.

### I. THE FLEET RULES CONFLICT WITH THE STRUCTURE OF THE CLEAN AIR ACT AND THE REQUIREMENT OF EPA REVIEW.

For more than 35 years, Congress has given the federal government the primary role in regulating new motor vehicle emissions. The Clean Air Act includes a carefully defined role for the State of California to establish a separate emissions control program. However, California may proceed ***only*** after EPA's review and approval. No official or entity representing the State of California has submitted the Fleet Rules to EPA for review and approval, and insofar as the Fleet Rules apply to new-vehicle purchases by fleets not owned by municipalities or other public agencies they have no historical regulatory foundation. The Fleet Rules are an attempted end-run around the plain language and structure of the Clean Air Act and the roles it assigns to California and the EPA.



#### A. From the Beginning of Federal Control of New Vehicle Emissions, Congress Has Conditioned California's Regulations Upon Review and Approval by the Federal Government.

The critical text in this case is found in section 209(a) of the Clean Air Act. This section broadly preempts virtually all state and local regulation of new motor vehicle emissions:

> No State ... shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles.... No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle ... as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle....

42 U.S.C. § 7543(a). This broad, express preemption has been the clear federal policy since 1967, when Congress first expressly preempted States from adopting or enforcing emissions-related requirements for new motor vehicles. *See* Air Quality Act of 1967, Pub. L. No. 90-148, § 208, 81 Stat. 485, 501.

Motor vehicle production is a capital-intensive business. A specific model of a motor vehicle is generally manufactured at only one or two plants. When it leaves the factory, the new vehicle enters a complex and highly competitive distribution system that often extends around the globe. Congress long ago recognized those aspects of the automobile industry. In 1965, when automotive air pollution regulation was first gaining wide attention, a Senate committee expressed concern not only about the need to control harmful emissions from vehicles, but that poorly coordinated regulation of new vehicle emissions could "result in chaos insofar as manufacturers, dealers, and users are concerned." S. Rep. No. 89-192, at 6 (1965).

By 1967, various States had either adopted or were close to adopting new vehicle emissions standards. To avoid the "chaos" foretold by the Senate committee in 1965, Congress added an express preemption provision to the Clean Air Act amendments adopted in 1967. *See* Pub. L. No. 90-148 § 2, 81 Stat. at 501; H.R. Rep. No. 90-728, at 21 (1967) (preemption was "necessary in order to prevent a chaotic situation from developing in interstate commerce in new motor vehicles."); S. Rep. No. 90-403, at 33 (1967) (multiple standards would result in "economic disruption" and increased costs to consumers).

Prior to 1967, California had adopted requirements for the installation of emission control devices on certain classes of new and used vehicles.[6] At hearings held in Los Angeles in February 1967, federal officials testified that it was possible that federal regulations pertaining to new vehicle emissions at a national level would preempt the California

[6] California's regulations had been adopted by the California Department of Public Health under authority of the California Motor Vehicle Control Act of 1960. *See* James E. Krier & Edmund Ursin, POLLUTION AND POLICY: A CASE ESSAY ON CALIFORNIA AND FEDERAL EXPERIENCE WITH MOTOR VEHICLE AIR POLLUTION, 1940-1975, 117-18, 147 (1977). During the 1950s local authorities in southern California had debated adoption of rules requiring pollution control devices on new and used vehicles, but decided not to do so until technology improved. *See* Harold W. Kennedy, *The Legal Aspects of Air Pollution Control with Particular Reference to the County of Los Angeles*, 27 S. CAL. L. REV. 373, 391-94 (1954). Officials of the Los Angeles County Air Pollution Control District advocated Statewide automotive emissions controls. *See* J. Krier & E. Ursin, *supra* at 177. The only local efforts to control automotive air pollution consisted of directives by municipalities that their own fleets purchase vehicles equipped with pollution controls. *See* Harold W. Kennedy & Martin E. Weekes, *Control of Automobile Emissions—California Experience and the Federal Legislation*, 33 LAW & CONTEMP. PROBS. 297, 308 (1968).



rules.[7] Persuaded that California should be able to maintain a separate program notwithstanding the prospect of new federal regulations, Congress exempted California from the general rule of preemption. Under some circumstances—described below—Congress created an exception to the general rule on preemption for "any State which has adopted standards ... for the control of emissions from new motor vehicles ... prior to March 30, 1966," a category that included only California. *See* 81 Stat. at 501. At about the same time, in California, the California legislature created a new agency, the State Air Resources Board (now the California Air Resources Board, or "CARB"). In its chartering legislation CARB was given exclusive authority to adopt vehicle emission control rules in the State.[8]

Congress provided that CARB was not free to adopt any rules for new motor vehicles in California that it wanted. Instead, Congress required California to seek a waiver of federal preemption from the federal government. Review of California's waiver applications later was assigned to the new, federal Environmental Protection Agency in the Clean Air Act Amendments of 1970.[9] As amended in 1970, the

[7] *See Air Pollution—1967 (Automotive Air Pollution)*, HEARINGS BEFORE THE SUBCOMMITTEE ON AIR AND WATER POLLUTION OF THE COMMITTEE ON PUBLIC WORKS, UNITED STATES SENATE (90th Cong., 1st Sess.) 108-109, 115 (testimony of Dean Coston, Deputy Undersecretary of Health, Education and Welfare, and Sidney Edelman, of the Office of General Counsel, Department of Health, Education and Welfare).

[8] The 1967 Mulford-Carrell Act creating the State Air Resources Board provided that "[l]ocal and regional authorities have the primary responsibility for the control of air pollution except for the emissions from motor vehicles. These authorities may control emissions from ***nonvehicular*** sources." Cal. Health & Safety Code § 39012 (West Supp. 1973) (emphasis added); *see also* Kennedy & Weekes, *supra*, at 307-08 (Mulford-Carrell Act generally preempted local regulation of automobile emissions.)

[9] Pub. L. No. 91-604, 84 Stat. 1676.

California waiver provision in section 209 allowed the State to avoid federal preemption if its standards: (a) would be "in the aggregate, at least as protective of public health ... as applicable federal standards"; (b) were needed "to meet compelling and extraordinary conditions"; and (c) were consistent with the technological and economic feasibility requirements of section 202(a).

CARB must seek a waiver for any new set of standards it adopts.[10] In 1977, Congress amended the Clean Air Act to permit other, qualifying States to piggyback on the California waiver by adopting and enforcing vehicle emission regulations that are "identical" to "the California standards for which a waiver has been granted" for the same model year. 42 U.S.C. § 7507; *see* Petitioners' Opening Brief at 7-8.

This ensures that the nation's vehicles have to comply with either the federal vehicle emission control standards promulgated by EPA, or the California standards that have been reviewed and approved by EPA. Thus, "there are two, and only two, permissible sets of regulations limiting emissions from new cars sold in the United States"—the federal rules and the EPA-approved California rules. *Virginia v. EPA*, 108 F.3d 1397, 1401 (D.C. Cir. 1997).

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[10] When California modifies an existing requirement that has already received a waiver, as opposed to adopting a new standard, it often finds that the amendments are "within the scope" of its previous waiver. EPA has defined specific criteria that must be met before an amended regulation can be found to be within the scope of a previous waiver. The required findings are that the California amendments: (1) "do not cause the California standards, in the aggregate, to be less protective than applicable Federal standards"; (2) "do not cause California's requirements to be inconsistent with section 202(a) of the Act"; and (3) "present no new issues" affecting EPA's previous waiver determinations. 46 Fed. Reg. 36,742, 36,743 (July 15, 1981).



Section 209(b) has been administered by EPA to allow CARB, acting on behalf of the State of California, considerable discretion to adopt rules that differ from federal requirements—but only after EPA has carefully examined the California rules. Typically, EPA schedules a public hearing or requests public comment on whether to conduct such a hearing before deciding what action to take on a request from CARB for approval of new standards. *See* 42 U.S.C. § 7543(b)(1). CARB makes a practice of seeking EPA review for a variety of measures, ranging from new limits on exhaust emissions, to compulsory warranties, maintenance instructions, quotas for the sale of vehicles meeting particular standards, and manufacturer reporting requirements.[11]

A request for review of a new rule from California frequently triggers an extended technical review by EPA engineering staff and counsel.[12] In complex situations, CARB sometimes makes major changes in its proposed rules before EPA takes final action, occasionally withdrawing them from consideration by EPA or supplementing the

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[11] *See, e.g.*, 57 Fed. Reg. 24,788 (June 11, 1992) (new standards for alternative fueled vehicles); 59 Fed. Reg. 46,978 (Sept. 13, 1994) (new test procedures to enforce standards); 55 Fed. Reg. 28,823 (July 13, 1990) (reporting requirements); 63 Fed. Reg. 6,173 (Feb. 6, 1998) (warranties); 67 Fed. Reg. 60,680 (Sept. 26, 2002) (waiver application for new standards for zero-emission vehicles withdrawn by CARB); 44 Fed. Reg. 61,096, 61,100 (Oct. 23, 1979) (maintenance instructions); *see also Motor & Equip. Mfrs. Assn. v. EPA*, 627 F.2d 1095, 1103-05 (D.C. Cir. 1979) (related maintenance regulations).

[12] *See, e.g.*, 61 Fed. Reg. 53,371 (Oct. 11, 1996) (concluding 14-month review of onboard diagnostic testing rules); 57 Fed. Reg. 38,503 (Aug. 25, 1992) (concluding two-year consideration of rules for methanol-fueled vehicles); 59 Fed. Reg. 46,978 (Sept. 13, 1994) (concluding 16-month review for new test procedures); 59 Fed. Reg. 48,625 (Sept. 22, 1994) (concluding 35-month review for new standards for medium-duty vehicles).

record in order to establish compliance with the criteria in section 209(b) of the Clean Air Act.[13] EPA can approve or deny CARB's request for a waiver of federal preemption in whole or in part, or condition its approval on certain modifications in the California program needed to comply with section 209(b).[14]

EPA traditionally has interpreted section 209(b) to require it to make various findings with respect to the section 202(a) requirements before it can grant a waiver for a California standard. These include findings that "adequate technology exists with which to meet them [the California standards]" and that "adequate lead time is available in which to implement that technology."[15] Adequate lead-time must be available for "both translating the available technology into a form satisfactory for mass-production, and tooling and setting up the facilities to actually produce the vehicles."[16] In deciding whether to grant a waiver, EPA

[13] *See, e.g.*, 59 Fed. Reg. 46,978, n.1 (Sept. 13, 1994) (CARB limited initial waiver request and expected to submit new request "in order to produce a more closely aligned test procedure" with new federal test procedure); 57 Fed. Reg. 909, 911 n.9 (Jan. 9, 1992) (CARB supplemented prior submissions to take account of changes in federal standards that could affect its "protectiveness" determination); 60 Fed. Reg. 41,066 (Aug. 11, 1995) (CARB withdrew section 209 submission in order to engage in additional rulemaking).

[14] *See, e.g.*, 36 Fed. Reg. 8,172 (Apr. 30, 1971) (granting in part and denying in part waiver of preemption); 37 Fed. Reg. 8,128 (Apr. 25, 1972) (same); 40 Fed. Reg. 30,311 (July 18, 1975) (same); 42 Fed. Reg. 31,639, 31,641 (June 22, 1977) (noting waiver had been granted on condition that CARB rule would be modified). The early decisions noted *supra* established the basic parameters for obtaining a waiver, and since the early 1970s, CARB has learned how to limit and shape its rules in order to obtain waivers.

[15] *See* 40 Fed. Reg. 23,102 (May 28, 1975); 42 Fed. Reg. 2,337, 2,340 (Jan. 11, 1977).

[16] *See* 40 Fed. Reg. 30,311, 30,314 (July 18, 1975).



must also consider whether the costs of compliance would be "excessive" and consider the position of all companies competing in the California market.[17] *See Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1118 (D.C. Cir. 1979) (EPA properly considered "the economic costs of motor vehicle emission standards and accompanying enforcement procedures" in its review of California rules under section 209).

There is thus more than 35 years of established state and federal administrative practice devoted to the Congressional design of 1967: broad, express preemption of any non-federal new vehicle emission controls, and permission for California to adopt its own controls and request approval of those controls from EPA. Since 1967, Congress has not lifted the broad preemption of section 209(a), nor has it lifted the requirement that non-federal regulations must receive federal approval before they may be imposed.

The role assigned to local jurisdictions under title II is also contained in section 209. The statute, in section 209(d), reserves to local governments and States the ability to "control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles." 42 U.S.C. § 7543(d); *see* section II, *infra*. Preemption is complete, however, for any "new" motor vehicle, which the Clean Air Act defines as "a motor vehicle the equitable or legal equitable title to which has never been transferred to an ultimate purchaser." 42 U.S.C. § 7550(3); *see Sims v. Fla. Dep't of Highway Safety & Motor Vehicles*, 862 F.2d 1449, 1454-1455 (11th Cir. 1989) (en banc) (state cannot attempt to enforce any standard prior to initial vehicle sale).

[17] *See, e.g.*, 43 Fed. Reg. 15,490, 15,492 (Apr. 13, 1978); 40 Fed. Reg. 30,311 (July 18, 1975).

## B. The Fleet Rules Are Preempted.

The main categories of federal preemption -- *i.e.*, express, conflict and field preemption -- are not "rigidly distinct." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 n.5 (1990). In the presence of an express preemption clause, "the task of statutory construction must in the first instance focus on the plain wording of the [preemption] clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). Starting with the text of section 209(a), and then proceeding through the structure and legislative history of the statute, there can be no question that the Fleet Rules contravene both the express and implied intent of Congress.

### 1. The Fleet Rules Are "Standards" and "Conditions Precedent" on Sale.

Applying the statutory text, the Fleet Rules are expressly preempted because (1) they are "standard[s] relating to the control of emissions from new motor vehicles or new motor vehicle engines," and (2) they are a "condition precedent to the initial retail sale" of new vehicles "relating to the control of emissions." 42 U.S.C. § 7543(a).

Controlling emissions is the entire purpose and effect of the Fleet Rules. *See Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 158 F. Supp. 2d 1107, 1114 (C.D. Cal. 2001) ("*EMA*") (noting that Fleet Rules are "an effort to reduce public exposure to motor vehicle pollution"). The Fleet Rules mandate particular vehicle designs (namely, engines that run on natural gas). If local design standards related to emissions control are not preempted "standards" under the Clean Air Act, then nothing is.

The Second Circuit has offered a reasonable interpretation of "standard" under section 209(a) that gives the preemption clause discernible meaning and clearly covers the Fleet Rules: "We view 'standards relating to the



control of emissions' as describing regulatory measures intended to lower the level of auto emissions." *Am. Auto. Mfrs. Ass'n v. Cahill*, 152 F.3d 196, 200 (2d Cir. 1998). In the *Cahill* case, the State of New York had attempted to enforce a quota for the sale of vehicles that met California's zero-emission vehicle standards.[18] There was no question that the numerical emission limit that New York sought was a valid and fully-waived California standard—just as in this case, SCAQMD will surely note that the vehicles it is requiring are classified as meeting one or more emissions limits set by CARB. As Chief Judge Winter held, however, a rule specifying how many vehicles meeting a given emission limit must be sold is a "standard," because it "has no purpose other than to effect a general reduction in emissions," and is "in the nature of a command having a direct effect on the level of emissions." 152 F.2d at 200.[19]

There can be no doubt that the Fleet Rules are intended to control and lower vehicle emissions—even if the technological assumptions underlying the Fleet Rules are now obsolete. Moreover, the Fleet Rules expressly control emissions given that they incorporate a subset of vehicles approved by the CARB for purposes of emissions control. The fact that the Fleet Rules expressly limit the purchase of vehicles to a subset of California certified vehicles, while prohibiting the purchase of other vehicles that comply with California and federal emission limits,

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[18] *See* Cal. Code Regs. 13 § 1962 (2002). For the history of the *Cahill* litigation and related matters, see Arnold W. Reitze, Jr., AIR POLLUTION CONTROL LAW: COMPLIANCE AND ENFORCEMENT 307-312 (2001).

[19] *Accord Am. Auto. Mfrs. Ass'n v. Mass. Dep't of Envtl. Protection*, 163 F.3d 74, 76-77, 83-84 (1st Cir. 1998); *see also* Letter from G. Guzy, EPA General Counsel, to T. Reilly, Att'y Gen. of Mass., Sept. 15, 1999, at 9 ("A numerical emission limit, by itself, has no real meaning absent a tie to the kind and number of motor vehicles to which the limit applies") attached in Amicus Br. App. 17a - 19a.

necessarily means that the Rules are "standards" relating to control of vehicle emissions.

Other parts of title II make it clear that "standards" include not only numerical emission limits, but also rules that govern vehicle transactions. For example, section 202 specifies that in the 1994 model year, 40 percent of passenger cars must meet specific emissions levels. 42 U.S.C. § 7521(g)(1). The text of section 202 is clear that such "standards" include both the emission level and the percentage of vehicles that must meet that emission level. *See id.* (requiring "*standards* which provide that emissions from a *percentage* of each manufacturer's sales volume ... shall comply with the levels specified") (emphasis added).[20] Just as those federal requirements are expressly "standards," the Fleet Rules—which also regulate what the new-vehicle market must absorb—are likewise "standards."[21]

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[20] *See also* 42 U.S.C. § 7521(g)(2) (requiring "*standards* which provide that such emissions from a percentage of each manufacturer's sales volume of such vehicles and trucks shall not exceed the levels specified") (emphasis added); 42 U.S.C. § 7521(h) (same).

[21] In *Motor & Equipment Manufacturers Ass'n v. EPA*, 627 F.2d 1095, 1125-28 (D.C. Cir. 1979), the District of Columbia Circuit reviewed EPA's decision to waive preemption for various enforcement procedures for new motor vehicles adopted by CARB. It accepted a definition of "standard" derived from *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978), that a work practice standard was not an "emission standard" under section 112 of the Clean Air Act. *Adamo Wrecking* defined an "emission standard" in that context as a "quantitative level" to be attained by use of "techniques," "controls," and "technology." *Id.* at 286. Insofar as SCAQMD's Fleet Rules incorporate both quantitative emissions limits (*i.e.*, those set by CARB) and their own percentage requirements, they would be "standards" under the D.C. Circuit's adaptation of *Adamo Wrecking*, as well as under *Adamo Wrecking* itself. *See, e.g.*, JA 60-63 (Fleet Rule 1194 mandating the purchase of vehicles meeting specifically defined emissions limits by operators of airport ground access fleets, in absence of waiver) *and* Petitioners' Opening Brief at 16-17. Since the 1977 CAA Amendments, work practice standards are emission standards.

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Turning next to the second sentence of section 209(a), there is likewise little doubt that SCAQMD has imposed a "condition precedent" relating to emissions control on the "initial retail sale" of the regulated vehicles.[22] Simply put, for certain purchasers, an otherwise legal vehicle may only be purchased or sold if, as a condition precedent to the sale, it has been certified as utilizing a type of "alternative fuel" engine SCAQMD has mandated.[23]

Attempting to circumvent section 209(a)'s express preemption and to distinguish the First and Second Circuit decisions, the district court reasoned that the plain statutory prohibition of any "standard," and the more precise prohibition of restrictions on "sale," do not cover a restriction on "purchase." Both the First and Second Circuits have held that "sales" restrictions related to emissions control are preempted "standards" under section 209(a).

The analysis by the district court to which the Ninth Circuit acceded would allow any preempted sales requirement to be re-written as a ban on the "purchase" of the very same vehicles. Such a distinction would make the express preemption provision in the statute pointless. Every new vehicle transaction involves the purchase of the vehicle

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*See* 42 U.S.C. § 7602(k). Whatever the scope of "standard" in the context of sections 112, 202(a) or 209(b), the scope of "standard" in section 209(a) is plainly broader given the accompanying terms. The express preemption of section 209(a) reaches "***any*** standard ***relating to*** the control of emissions" (emphasis added).

[22] The second sentence of section 209(a) states, "No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as a condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment." 42 U.S.C. § 7543(a).

[23] *See* Petitioners' Opening Br. at 14-17.

by the purchaser and the sale of the vehicle by the seller. In particular, from the standpoint of manufacturers and dealers, there is no relevant difference between a prohibition on purchases and a prohibition on sales. When Congress preempts emissions-related restrictions on the "sale" of new motor vehicles, it necessarily preempts emissions-related restrictions on the purchase of new motor vehicles.

### 2. The Fleet Rules Would Impermissibly Circumvent EPA Approval.

Moving beyond section 209(a), there is not an iota of textual support for "purchase" restrictions related to emissions control being permissible absent ***federal*** approval by EPA. As discussed above, CARB seeks EPA approval of everything from new limits on exhaust emissions, to fees charged to manufacturers, compulsory warranties, maintenance instructions, reporting requirements, and underhood labels that present emission information. SCAQMD has no authority to circumvent the federal approval process of section 209(b).

The Clean Air Act does not permit SCAQMD to disagree with CARB's emission standards or EPA's emission standards and strike out on its own, outside of the section 209(b) EPA approval process. Such circumvention presents a clear conflict with the regime established by Congress. Even in the absence of express preemption, SCAQMD's end-run around section 209(b) is impliedly preempted because it obviously frustrates the Congressional design. *See Geier v. American Honda Motor Co.*, 529 U.S. 861, 874 (2000); *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 100-02 (1992) (plurality opinion); *id.* at 112-113 (Kennedy, J., concurring in judgment) (finding express rather than implied preemption).

If SCAQMD's non-EPA-approved gambit is permissible, then any local government may pick and choose the new vehicles it prefers for sale (or "purchase") in its jurisdiction.



Some jurisdictions might choose natural-gas-powered vehicles, others might select battery-powered electric vehicles, and others might limit part of the market to hydrogen fuel-cell vehicles. There is no principled reason why any other political subdivision in America may not do so as well. *Cf. Buckman Co. v. Plaintiffs' Legal Committee,* 531 U.S. 341, 350 (2001) (measuring frustration of federal objectives "in the shadow of 50 State's tort regimes" in conflict preemption analysis); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 626 (1973) (in a field preemption case, interference with a single weekly flight was sufficient to warrant invalidation of curfew on aircraft operations). Here, the potential for localized requirements would include not only any of California's own 35 air quality districts,[24] but any similar body anywhere in the country.

SCAQMD's claimed autonomy from EPA approval defies the "well settled" doctrine that "local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion." *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 430, 433 (2002) (quoting *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 607-08 (1991)). A corollary of that principle has to be that if California is preempted unless it receives EPA approval, so is SCAQMD.[25] To the extent that SCAQMD is a creature of

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[24] *See* http://www.arb.ca.gov/emisinv/maps/statemap/dismap.htm.

[25] For this same reason, SCAQMD cannot rely upon any grant of authority from the State of California because, as an agent of the State of California, any exercise of such delegated authority would merely bring SCAQMD within the ambit of preemption provisions referring to the "State" itself. The 1987 amendment to the California Health & Safety Code cited by the district court as a statutory basis for the Fleet Rules post-dated the creation of SCAQMD by more than a decade, Cal. Health & Safety Code § 40447.5, Cal. Stats. 1987, c. 1301, § 10, and more

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the California legislature and tries to act as the agent of the State, it must (like its principal) obtain the required review approval from EPA. That is the regulatory scheme crafted by Congress in sections 209(a) and (b). Even if the substance of the Fleet Rules were consistent with the substance of federal emissions policy (which as discussed below is not the case), such local regulation is nevertheless pre-empted "if it interferes with the ***methods*** by which the federal statute was designed to reach [its] goal." *Gade*, 505 U.S. at 103 (plurality opinion) (emphasis added) (quoting *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987)).

Here, SCAQMD has transgressed the clear structure of the Clean Air Act's approval process, and the Fleet Rules therefore are preempted. *Id.* at 100-03 (plurality op.); *id.* at 112-113 (Kennedy, J., concurring in judgment) ("The statute is clear: When a State desires to assume responsibility for an occupational safety and health issue already addressed by the Federal Government, it must submit a state plan. The most reasonable inference from this language is that when a State does not submit and secure approval of a state plan, it may not enforce occupational safety and health standards in that area.").

SCAQMD's defense of the Fleet Rules has no logical boundary under federal law. If SCAQMD can compel fleet owners to select vehicles that use a particular type of fuel, or that meet a particular subset of duly-adopted CARB standards approved by EPA, there is no reason why, as a matter of federal law, it could not compel that every car purchased in the region use alternative fuels, operate on electricity or fuel cells, or any number of *en vogue* potential

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importantly, SCAQMD itself was not created until 1976 when the California legislature passed the Lewis-Presley Air Quality Management Act, Cal. Stats. 1976, c. 324, p. 893, § 5, which was well after Congress had added section 209 to the Clean Air Act.



technologies, such as biomass or solar-powered vehicles. The artifice of regulating purchase rather than sale would make the text of section 209(a) irrelevant and unenforceable, and it would almost certainly invite crusades for automobile design standards to be imposed at the local level

### 3. The Fleet Rules Frustrate Federal Emissions Policy.

The circumvention of section 209(b) in this case has more than merely procedural importance. Environmental regulation of the automobile is now in its second generation. As standards have been more stringent, emissions reductions have become more costly, because all lower-cost control systems already have been incorporated into new vehicle designs. *See* J. Robert Mondt, CLEANER CARS: THE HISTORY AND TECHNOLOGY OF EMISSION CONTROL SINCE THE 1960S (2000) (nearly ten-fold increase in cost of automotive emission control hardware from 1975 to 1997).

To permit the industry to reduce emissions as cost-effectively as possible, CARB and EPA have used "fleet averaging" regulations. These rules generally allow a manufacturer to reduce emissions on different models to different levels, so long as the average emissions from the manufacturer's fleet as a whole meet a specified performance level, on a sales-weighted basis. *See Motor Vehicle Mfrs. Ass'n v. New York State Dep't of Envtl. Conservation*, 17 F.3d 521, 535 (2d Cir. 1994) ("The crux of the LEV plan is the fleet averaging concept. Fleet averaging is designed to give manufacturers sufficient flexibility to develop varying emissions within their entire fleet to meet the overall goal."). This allows a manufacturer to obtain the greatest reductions from vehicles for which control is relatively less costly, and to avoid having to control other models to the same level. To ensure that there is no environmental degradation, the rules also usually include "caps," which no model in the fleet may exceed.

The hallmark of the fleet averaging rules is flexibility, within the "caps" set by the regulation and subject to meeting the fleetwide performance standard. This is particularly true of the CARB rules that, but for the Fleet Rules, would apply in southern California to the covered fleets. *See, e.g.*, Cal. Code Regs. 13 § 1956.2(a) (2001) (goal of CARB's "Fleet Rule for Transit Agencies" is to require emissions reductions "while also providing flexibility to ... fleet operators to determine their optimal fleet mix.").[26] The wisdom of this approach is borne out by technological advances by manufacturers in recent years—in some instances after SCAQMD adopted the fleet rules—that have demonstrated that buses and other vehicles operating on diesel fuel can achieve very low emission levels, comparable to "alternative fuel" vehicles.[27] According to one transit official, diesel transport vehicles operating on advanced diesel fuel "is the most cost-effective way to reduce emissions."[28]

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[26] *See also* California Air Resources Board, *"LEV II" and "CAP 2000" Amendments to the California Exhaust and Evaporative Emission Standards and Test Procedures for Passenger Cars, Light-Duty Trucks and Medium-Duty Vehicles, and to the Evaporative Emission Requirements for Heavy-Duty Vehicles -- Final Statement of Reasons*, at 36 (1999) (Rules for passenger cars and trucks provide "[c]ompliance flexibility is provided by the ... fleet average requirement in that manufacturers may choose the mix of vehicle categories that best fits their production capabilities."), posted at http://www.arb.ca.gov/reqact/levii/to_oal/leviifso.pdf (last visited Aug. 27, 2003).

[27] *See, e.g.*, California Air Resources Board, Heavy-Duty Emissions Laboratory, Report No. 01-01, at 9 (2001) ("Limited testing at ARB has demonstrated that ... equally sized [diesel] hybrid and [natural gas] offer similar emission level[s]").

[28] *See* Michael Bologna, *Chicago Announces Plan to Convert Buses to Low-Sulfur Diesel Fuel Prior to Deadline*, Daily Environment Rep., Feb. 7, 2003, at A-7 (quoting Frank Kruesi, President of the Chicago Transit Authority).



The Fleet Rules, however, prevent the use of the most cost-effective alternatives, and foreclose the incentive for technological advance, by limiting several important fleet markets to vehicles that operate on natural gas. If the goal is to achieve emissions reductions, this is not the vehicle mix that the market would produce. As a panel of experts studying the trade-offs between vehicles using diesel and natural gas (or "compressed natural gas," abbreviated to "CNG") recently explained:

> Both diesel and CNG are considered robust technologies with reasonably quantified operation and maintenance costs. However, the costs for CNG engine technology are higher. Second, the infrastructure requirements are different. ... CNG infrastructure will require an overhaul after 20-30 years. ... [Diesel] infrastructure can be expected to last decades longer.

FY 2003 Two Hundred Bus Procurement, *Expert Panel Report to the Massachusetts Bay Transport Authority*, at 10-11 (Oct. 2, 2002), http://www.dieselforum.org/resources/MBTA.pdf (last visited Aug. 27, 2003); *see also* Jeffrey Ball, *Fuel for Debate: California's Clean-Air Czar's Shift is New Boost for Diesel*, Wall St. J., Oct. 24, 2002 (Chairman of CARB discussing the advantages of new diesel technology).

The Fleet Rules are a throw-back to earlier times, when regulation was premised on slower technological progress and assumed that "alternative fuels" were inherently cleaner, along with the vehicles that operated on those fuels. The rulemaking record in California even suggests that the Fleet Rules were animated at least in part by an aversion to diesel technology and have been supported by SCAQMD's dissatisfaction with the flexibility allowed in the CARB bus

regulations.[29] The Fleet Rules do not give the covered transit vehicle operators the option to purchase clean diesels. Likewise, even when they do allow some conventionally-fueled vehicle purchases, the Fleet Rules permit the purchase of only a subset of the many different types of vehicles allowed by the CARB rules that are subject to EPA review. In short, many vehicles certified by CARB as meeting all of California's emission requirements are unable to be purchased by fleet operators, because of SCAQMD's Fleet Rules.

## II. THE FLEET RULES ARE NOT SAVED BY ANY EXPRESS OR IMPLIED RESERVATION OF AUTHORITY TO LOCAL REGULATION.

The Fleet Rules regulate the purchase (and concomitantly, if the English language is to have any meaning, the "sale") of ***new*** motor vehicles for purposes of emissions control. For this reason, the Fleet Rules are preempted by section 209(a), which covers "new motor vehicles" and preempts any such condition precedent on their "sale." Moreover, for this same reason, SCAQMD has no resort to the savings clause of the Clean Air Act or any implied reservation of authority to local governments that might be presumed.

The Clean Air Act expressly reserves certain local authority over emission control with respect to motor vehicle "use, operation, or movement" in section 209(d):

> Nothing in this part shall preclude or deny to any State or political subdivision thereof the right

[29] *See* Transcript of Public Meeting, California Air Resources Board, March 21, 2002, at 104 (test. of Henry Hogo, SCAQMD Assistant Deputy Executive Officer) ("We are urging [CARB] to eliminate the diesel path from the [CARB] transit bus rule."), transcript at www.arb.ca.gov/board/mt/mt032102.txt (last visited Aug. 27, 2003).



> otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles.

42 U.S.C. § 7543(d). The "natural implication" of such a savings clause is that state actions not covered by the savings clause "are not saved." *Gade*, 505 U.S. at 100 (plurality opinion); *cf. Geier*, 529 U.S. at 868 (interpreting an express preemption clause so that the savings clause would have content). It is a court's "duty 'to give effect, if possible, to every clause and word of a statute.'" *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (quoting *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)).

Construing this savings clause in tandem with the preemption clause of section 209(a), the clear line drawn by Congress is easy to discern: the federal government regulates the emissions control requirements for new motor vehicles until they are sold; following sale, the States and their political subdivisions may regulate a vehicle's "use, operation, or movement." Indeed, as EPA has explained and courts have recognized, "the longstanding scheme of motor vehicle emissions control has always permitted the states to adopt in-use regulations—such as carpool lanes, restrictions on car use in downtown areas, and programs to control extended idling of vehicles—that are expressly intended to control emissions." *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1094 (D.C. Cir. 1996).[30]

[30] Even within the ambit of section 209(d), however, states and localities must give a wide berth to the preemption provision in section 209(a). For example, rules cannot be imposed after the sale of vehicles that would have the effect of "circumvent[ing] ... the Clean Air Act and ... defeat[ing] the Congressional purpose" of section 209(a). *Allway Taxi, Inc. v. City of New York*, 340 F. Supp. 1120, 1124 (S.D.N.Y.), *aff'd*, 468 F.2d 624 (2d Cir. 1972).

Such in-use vehicle regulations are common to most metropolitan vehicle owners and their use has in some instances been codified and mandated in various parts of the Clean Air Act. The most important example of the regulation of in-use vehicles is the inspection and maintenance program (I/M) required in ozone nonattainment areas by section 182(b)(4), 42 U.S.C. § 7511a(b)(4).[31] Similar coverage of registered vehicles is found in the gasoline vapor recovery requirements of section 182(b)(3), 42 U.S.C. § 7511a(b)(3), transportation controls imposed by section 182(c)(5), 42 U.S.C. § 7511a(c)(5) and the vehicle mile reduction requirements of section 182(d)(1), 42 U.S.C. § 7511a(d)(1). The conformity provisions of section 176(c), 42 U.S.C. § 7506(c), require transportation plans and programs to be consistent with a transportation emissions budget for the aggregate emissions from motor vehicles in the area covered by the state implementation plan. These programs have characteristics common to all programs used by states to control emissions from in-use vehicles. They apply to all covered vehicles regardless of the emissions measured as part of the engines original certification, and they apply only to vehicles that have been purchased and registered to consumers.[32]

By contrast, the Fleet Rules regulate the sale of new vehicles to privately-owned and privately-operated fleets,

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[31] A more stringent enhanced I/M program is required in serious or worse ozone nonattainment areas by section 182(c)(1), 42 U.S.C. § 7511a(c)(1), and in moderate or worse carbon monoxide nonattainment areas with a design value greater than 12.7 parts per million by section 187(a)(6), 42 U.S.C. § 7512a(a)(6). *See generally* Arnold W. Reitze, Jr., *Federalism and the Inspection and Maintenance Program Under the Clean Air Act*, 27 PAC. L.J. 1461 (1996).

[32] *See generally* Arnold W. Reitze, Jr., *Transportation-Related Pollution and the Clean Air Act's Conformity Requirements*, 13 NAT. RESOURCES & ENV'T 406 (1998).



and therefore are unlike any traditional local regulation of motor vehicles. SCAQMD can point to no in-use motor vehicle control programs regulating the private purchase or sale of any classes of vehicles based on their potential emissions. A local government prohibition on purchasing certified vehicles is wholly inconsistent with existing or traditional in-use programs.

For this reason, the district court and the Ninth Circuit made a fundamental error by invoking a "presumption against preemption" in support of the Fleet Rules. While there is a tradition of the States regulating the use, operation and movement of motor vehicles, there is ***no*** such tradition of States, much less local governments, regulating the performance and design of ***new*** motor vehicles for purposes of emissions control. There is, however, over 35 years of extensive federal regulation of new vehicle emissions. Because the Fleet Rules, which are far from a traditional exercise of local police power, reach into "an area where there has been a history of significant federal presence," an "[a]ssumption of nonpreemption is not triggered." *See United States v. Locke*, 529 U.S. 89, 108 (2000) (internal quotation and citation omitted; *see also Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001) (rejecting presumption against preemption).

The district court and Ninth Circuit framed SCAQMD's police power at a level of generality so high as to be unrebuttable—*i.e.*, protecting health and safety. As the Ninth Circuit would have it, there is a presumption against preemption so long as California, or merely a locality within California, can assert that its regulations are protecting public health and safety. Such a non-textual presumption is virtually limitless. It is also irreconcilable with this Court's precedent.

At such a level of generality, the presumption against preemption surely would have applied in *Locke*, where the

State of Washington was protecting the safety of Puget Sound. The presumption should also have been applied in *Buckman*, where fraud on the Food and Drug Administration would affect health and safety. Yet in both *Locke* and *Buckman*, this Court squarely rejected construing the presumption against preemption so broadly. More significantly, this Court applied no presumption against preemption in *Geier v. American Honda* in holding that state regulation of the safety features of new motor vehicles, in effect a state tort law requirement mandating air bags, was preempted.

The district court and the Ninth Circuit failed to recognize that traditional, local regulation of motor vehicles for purposes of emissions control has been limited to regulation after vehicles have been sold. The regulation of the performance and design of new motor vehicle emissions control has for more than three decades been a ***federal*** program, and until SCAQMD's Fleet Rules, it has never been a local program. There is no textual support in the Clean Air Act for the Fleet Rules, and there is likewise no basis for a non-textual presumption in their favor.



## CONCLUSION

Because the Fleet Rules violate the plain text and structure of section 209 of the Clean Air Act, including the Clean Air Act's express preemption clause, and frustrate over 35 years of federal regulatory history, the Fleet Rules are preempted and the decision of the Ninth Circuit should be reversed.

Respectfully submitted,

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August 29, 2003



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY WASHINGTON, D.C. 20460

OFFICE OF
GENERAL COUNSEL

SEPT. 15 1999

Honorable Thomas F. Reilly
Attorney General
Commonwealth of Massachusetts
200 Portland Street
Boston, MA 02114

Dear Attorney General Reilly:

Thank you for your letter dated January 28, 1999, requesting the Agency's opinion regarding questions raised by the court in *American Automobile Manufacturers Association, et al. v. Massachusetts Department of Environmental Protection*, 163 F.3d 74 (1st Cir. 1998). EPA has reviewed this matter with particular concern for ensuring that states are provided continued flexibility in reducing emissions from automobiles and encouraging innovation in automobile design

As explained more thoroughly in the accompanying document, given the unique facts of this case and the language and intent of the Clean Air Act (the Act), EPA believes that Massachusetts's regulations requiring delivery of Zero Emission Vehicles (ZEVs) in Massachusetts from 1998-2000 are not preempted under the Act. Congress

sought to ensure that other states may benefit from steps taken by California to achieve cleaner cars. First, we believe that Massachusetts's ZEV mandate is a standard subject to the identicality restrictions of the Act. That said, given the unique factual circumstances surrounding these MOAs, EPA believes that the provisions of the MOAs requiring the placement of ZEVs in California should as well be considered standards adopted by California for purposes of section 177 and 209(a). Though the MOAs on their face are non-regulatory contractual agreements, the background for the MOAs indicate that they grew directly out of the ZEV regulatory requirements that were in place for the 1998-2002 model years prior to California removing them and were intended to stand in the place of and perform the function of these regulatory requirements, albeit with certain changes (e.g., the number of vehicles affected). Given these facts, EPA believes that state attempts to duplicate the MOAs in regulations should not be preempted by the Act.

EPA does not believe that voluntary agreements between states and manufacturers are generally preempted under section 209. EPA believes that California plays a very important role in promoting the development and sale of clean automotive technology, and that voluntary nonregulatory agreements are a valid tool to implement this role. Such agreements would not [2]normally be treated as standards for purposes of sections 209 and 177. However, under the unique factual circumstances of this case, EPA believes it is appropriate to consider these specific MOAs as standards adopted by California, which Massachusetts may then adopt under section 177.

Thank you again for your letter. If you have any questions regarding the enclosed response, please call me at (202) 260-8040.

Sincerely,



Gary S. Guzy
General Counsel

Robert Perciasepe
Assistant Administrator
Office of Air and Radiation

cc: Julie Becker, Alliance of Automobile Manufacturers
Kathleen C. Walsh, California Air Resources Board

## [1] OPINION ON ISSUES RAISED BY AAMA v. MASSACHUSETTS DEP

By letter dated January 28, 1999, Mr. Thomas F. Reilly, the Attorney General of Massachusetts, requested the Agency's opinion regarding questions raised by the U.S. Court of Appeals for the First Circuit in the case *American Automobile Manufacturers Assn v. Massachusetts Dept of Environmental Protection*, 163 F.3d 74 (1st Cir. 1998). That case involves a challenge by automobile manufacturers to Massachusetts's zero emission vehicle (ZEV) production requirement for calendar years 1998-2000. Massachusetts's ZEV mandate for model year 2003 and beyond is not at issue. The Court's opinion, dated December 29, 1998, specifically directed Massachusetts to seek the Agency's opinion on these questions. The Court stayed proceedings in the case for 180 days to allow time for the Agency to provide its opinion. On July 7, 1999, the court, pursuant to a request from EPA, stayed further proceedings until September 15, 1999. If EPA does not issue any opinion by that date, the Court said it would decide the issues without EPA guidance.

The letter requests EPA's opinion regarding whether Massachusetts's ZEV production requirement is preempted under the Clean Air Act. The ZEV requirement mandates that the seven largest automobile manufacturers produce for sale specific numbers of ZEVs in the 1998-2000 calendar years. The Court ruled that EPA has primary jurisdiction over the issues,[1] which arise under sections 209 and 177 of

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[1] Primary jurisdiction is "a doctrine specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency. It requires the court to enable a 'referral' to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling." *Id.* at 81, quoting *Reiter v Cooper*, 507 U.S. 258, 268 113 S. Ct. 1213 (1993).



the Clean Air Act. The Court also indicated that it expected to give deference to EPA's view on these issues.

EPA believes that, given the text and the underlying goals of the statute and in light of the unique facts of the case, Massachusetts's ZEV requirement should not be preempted. EPA believes that this interpretation ensures that, under similar circumstances, states will be able to implement the emission control standards in effect in California, as contemplated by section 177 of the Act.

### I. Background

#### A. Statutory Provisions

The Clean Air Act generally prevents states from enacting their own emission control programs for new motor vehicles. Section 209(a) of the Clean Air Act (CAA or the Act), 42 U.S.C. § 7543(a), prohibits states from "adopt[ing] or attempt[ing] to enforce any standard relating to the control of emissions from new motor vehicles..." Also, "[n]o State shall require certification, inspection, or any approval related to the control of emissions from any new motor [2] vehicle ... as conditions precedent to the initial sale, titling ... or registration of such motor vehicle..."

There are, however, two exceptions to this general rule. First, when Congress enacted the section 209(a) prohibition in 1967, it recognized that California has special air quality needs justifying a new motor vehicle emission control program more stringent than the federal program, and that California has been the trailblazer in requiring stringent emission controls for motor vehicles. S. Rep. No. 403, 90th Cong., 1st Sess. 33 (1967). Therefore, Congress at the same time enacted section 209(b), which allows California, pursuant to a waiver granted by EPA, to enact its own motor vehicle program, as long as it is at least as stringent, in the aggregate, as the federal program and is technologically feasible given leadtime and cost.

Second, in 1977, Congress enacted CAA section 177, 42 U.S.C. § 7507, which allows other states to enact regulations controlling emissions from new motor vehicles, but only if the state standards are identical to California's standards controlling motor vehicle emissions. This provision allows other states to control emissions from new motor vehicles without requiring motor vehicle manufacturers to comply with a patchwork of different state standards. See *Motor Vehicle Manufacturers Ass'n v. New York*; 17 F. 3d 521, 527-28 (2nd Cir. 1994). Under section 177, as amended in 1990:

> Notwithstanding section 209(a), any State which has plan provisions approved under this part may adopt and enforce for any model year standards relating to control of emissions from ~~new motor~~ vehicles . . . if
>
> (1) such standards are identical to the California standards for which a waiver has been granted for such model year, and
>
> (2) California and such State adopt such standards at least two years before commencement of such model year .... Nothing in this section or in title II of this Act shall be construed as authorizing any such State to prohibit or limit, directly or indirectly, the manufacture or sale of a new motor vehicle. . . that is certified in California as meeting California standards, or to take any action of any kind to create, or have the effect of creating, a motor vehicle . . . different than a motor vehicle . . . certified in California under California standards (a "third vehicle") or otherwise create such a "third vehicle."

B. Regulatory Background

In 1990, California adopted regulations establishing a Low Emission Vehicle (LEV) program, which requires automobile manufacturers ("manufacturers") to meet progressively more stringent automobile standards beginning in model year 1994. The LEV program provides that



manufacturers must build vehicles that meet one of several sets of standards (i.e. "Tier 1 vehicles," Transitional Low Emission Vehicles (TLEVs), Low Emission Vehicles (LEVs), Ultra Low Emission Vehicles (ULEVs) and Zero Emission Vehicles (ZEVs)) and that manufacturers' fleets for each model year must meet a fleetwide non-methane organic gases (NMOG) emission [3] average, which becomes progressively more stringent each year. The LEV program also initially included a provision requiring that, beginning in model year 1998, two percent of all automobiles offered for sale by manufacturers in any model year must be ZEVs. This percentage increased to five percent in model year 2001 and to ten percent in model year 2003. The only vehicles that can meet this requirement using current technology are electric vehicles. In January, 1993, EPA granted California's request for a waiver of preemption under CAA section 209(b) for its LEV program, including the ZEV provisions,

Following California's adoption of its LEV program, New York and Massachusetts adopted state motor vehicle requirements that mirrored the California LEV program, including the ZEV provisions, under CAA section 177. Manufacturers sought judicial review of the New York and Massachusetts requirements, claiming the regulations were preempted under the Clean Air Act. Manufacturers argued, among other things, that the states' adoption of California's ZEV mandate violated: 1) section 177's requirement that state regulations not limit the sale of California vehicles; and 2) section 177's "third vehicle prohibition." In both cases, the courts found that the state programs were not preempted. *American Automobile Manufacturers Assn v. Greenbaum*, No. 93-10799-MA (D. Mass. Oct. 27, 1993),[2] *aff'd* 31 F. 2d

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[2] The court in the Massachusetts case did not make a final ruling, but denied manufacturers' motion for a preliminary injunction on Counts 1 through 4 of their complaint, which are not directly related to

(Continued...)

18 (1st Cir. 1994); *Motor Vehicle Manufacturers Assn v. New York*, 17 F. 3d 521 (2nd Cir. 1994); *Motor Vehicle Manufacturers Assn v. New York*, 79 F. 3d 1298 (2nd Cir. 1996). The Court in the New York case dealt specifically with the manufacturers' claims against New York's ZEV mandate, and found that the New York's ZEV production requirement did not violate the "sales limitation" or "third vehicle" prohibitions of section 177 because New York's ZEV requirement was identical to California's ZEV requirement. *Motor Vehicle Manufacturers Ass'n v. New York*, 17 F. 3d at 536-538. EPA filed amicus briefs defending the New York and Massachusetts programs in these cases.

However, in 1997, California deleted the ZEV sales requirement from its regulations for all model years prior to 2003. At approximately the same time, California signed seven Memoranda of Agreement (MOAs) with the largest manufacturers: In the MOAs, the manufacturers agreed to a demonstration program under which manufacturers would place in California substantially fewer numbers of ZEVs from calendar years 1998 to 2000 than were required under the initial regulations. The manufacturers agreed to place a combined total of 750 ZEVs in California in 1998 and a combined total of 1500 ZEVs in California in both 1999 and 2000. No ZEVs were required in calendar years 2001 and 2002. California agreed in the MOAs to provide a certain amount of infrastructure and support to facilitate the use of ZEVs. Manufacturers also agreed to provide LEVs nationwide under the National Low Emission Vehicle (NLEV) program. Manufacturers are subject to potentially severe penalties, through liquidated damages, if they fail to

manufacturers' issues regarding the ZEV mandate, based on the "strong showing on the merits" by Massachusetts. *Id*, slip op. at 26.



comply with the MOA. For example, a complete failure to implement the [4] MOA could lead to a penalty equal to a manufacturer's pro-rata share of $100,000,000.[3] The determination of whether a breach has occurred is determined initially by the Executive Officer for California's Air Resources Board (CARE), with *de novo* review by the Board, and then *de novo* review in state court. There are no similar provisions for a breach by California. These MOAs were not codified into California's regulations and were not submitted to EPA for a waiver.

Following California's deletion of its ZEV mandate between 1998 and 2002, Massachusetts revised its own ZEV requirements for those years to require that manufacturers deliver in Massachusetts the number of ZEVs each manufacturer agreed to "place" in California under the seven MOAs. Massachusetts also enacted certain reporting requirements related to placement of ZEVs in Massachusetts.[4]

C. Litigation

AAMA sued Massachusetts in the Federal District Court in Massachusetts, claiming that Massachusetts's ZEV requirement is an emission standard prohibited by CAA

3 Each manufacturer's pro-rata share, based on historical share of the California market, is defined in the MOAs.

4 New York, on the other hand, did not revise its ZEV mandate, continuing to require two percent of manufacturers' vehicles to be ZEVs in the 1998-2000 model years. Manufacturers brought a new challenge to New York's ZEV requirement based on the fact that it was no longer identical to California's requirement and therefore violated section 177. The Second Circuit found that the New York ZEV mandate was preempted. *American Automobile Manufacturers Ass'n v. Cahill*, 152 F. 3d 196 (2nd Cir. 1998) ("Cahill").

section 209(a) and is not permitted by CAA section 177. AAMA claims that the California MOAs are not "standards" as that term is used in sections 177 and 209 of the CAA, but rather contractual agreements. AAMA claims that since Massachusetts's ZEV production requirement is a state standard prohibited under section 209(a) and since it is not identical to any California standard, it is not authorized by, section 177. AAMA also claims that even if the MOAs are standards, California has never asked for or received a waiver for them, so Massachusetts's ZEV mandate is not identical to any California standard for which a waiver had been granted. Finally, AAMA claims that the Massachusetts sales requirement is not identical to the MOAs because it did not contain the reciprocal obligations that California had obliged itself to meet under the MOAs, and Massachusetts had not changed the sales requirements in the MOAs to take account of the smaller number of vehicles sold in Massachusetts compared to California.

Massachusetts claims that its ZEV mandate is not preempted because it is not a "standard" under section 177 but is instead an "enforcement mechanism" related to the LEV standards, which, Massachusetts claims, need not be identical to California standards under section 177. Alternately, Massachusetts claims that if a ZEV mandate is a standard, it is a standard whether it is in regulations, as in Massachusetts, or in MOAs, as in California. Thus, California's ZEV [5] requirements would also be standards and Massachusetts's ZEV regulations would be identical to them. Massachusetts claims that its failure to incorporate California's obligations do not render its standards non-identical because the automobile manufacturers' obligations under the MOAs are not dependent on California's obligations. Moreover, Massachusetts claims that California does not need to receive a separate waiver from EPA for the MOAs because they are within the scope of the previous waiver granted to California for its LEV program.



1. The Decision of the District Court

The District Court found that Massachusetts's ZEV mandate was preempted by the CAA, because it "does not adopt a standard identical to California law, or enforce such a standard." *American Automobile Manufacturers Ass 'n v. Massachusetts Dept of Environmental Protection*, 998 F. Supp. 10, 18 (D. Mass. 1997) ("*AAMA I*"). The Court found that California's MOAs were not standards because they were voluntary agreements. The Court stated that Massachusetts's mandate violates the "identicality" provision because it "adopts or enforces" a standard in 1998 (i.e. the production of ZEVs) that California does not require until 2003. Though the Court did not specifically decide whether the ZEV mandate is itself a standard, the court found that the Massachusetts ZEV mandate was preempted. Massachusetts appealed.

2. The Decision of the Court of Appeals

The Court of Appeals for the First Circuit found that many of the issues raised by the case, including the issue of whether the ZEV mandate and the MOAs are "standards," are within EPA's primary jurisdiction and would benefit from EPA's "deep familiarity with the CAA and the public policy considerations that underlie these statutory provisions." *American Automobile Manufacturers Ass'n v. Massachusetts Dept of Environmental Protection*, 163 F. 3 d 74, 83 (1st Cir. 1998) ("*AAMA II*").

The court further determined that the statutory interpretations of these provisions "lend themselves to competing interpretations ... and that both are sufficiently reasonable that we would be bound by *Chevron* to defer to the EPA's choice of either one." *Id.*, at 83.

The court gave Massachusetts 180 days to obtain a ruling from the EPA on these issues, providing a deadline of June 27, 1999. The court said it would decide the issues without

EPA's guidance if EPA did not provide its opinion by that date.[5]

D. Administrative Proceedings

On March 26, 1999, EPA published a notice in the Federal Register requesting comment from the public on the letter from the Massachusetts Attorney General. The period for comment [6] ended on April 26, 1999. EPA received detailed comments from Massachusetts and New York supporting Massachusetts's ZEV requirements and detailed comments from California and the Alliance of Automobile Manufacturers/Association of International Automobile Manufacturers against the ZEV requirements. EPA also received several more summary comments from other parties either supporting Massachusetts or the automobile manufacturers.

On June 24, 1999, in a letter from Robert Perciasepe, Assistant Administrator for Air and Radiation to Attorney General Thomas F. Reilly, EPA notified Massachusetts that it was having difficulty meeting the deadline of June 27, 1999 set by the court and anticipated issuing its response by early September. EPA requested that Massachusetts inform the court and inquire whether answering the court's questions in this time frame is acceptable. Massachusetts provided this letter to the court. On July 7. 1999, the court granted the request for additional time, providing EPA until September 15, 1999 to respond to the court's questions.

II. Analysis

There is a two-step analysis to determine whether the Massachusetts ZEV mandate is preempted by the Clean Air

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5 As earlier noted, pursuant to EPA request, the court has now extended the deadline to September 15, 1999.



Act. The first issue is whether the regulation is, as a preliminary matter, prohibited under section 209(a) of the Act. If the regulation would be so prohibited, the next issue is whether the provisions of section 177 nonetheless permit the regulation. With regard to Massachusetts's ZEV mandate, the court answered the first issue and therefore did not refer it to EPA. Thus this document focuses principally on the second issue.

A. Does Section 209(a) Preempt the Massachusetts ZEV Mandate?

The First Circuit ruled that whether the ZEV sales requirement is a standard or an enforcement procedure, it is preempted by section 209(a). This is based on the clear language of section 209(a), which forbids states from "adopt[ing] or attempt[ing] to enforce any standard." Thus, whether the ZEV mandate is itself a standard, as manufacturers claim, or is merely a mechanism for enforcing the other LEV standards, as Massachusetts claims, it is subject to the preemption provisions of section 209(a). *AAMA II* at 83. EPA agrees with the court's reasoning on this issue.

B. Does Section 177 Override Section 209's Preemption as to the Massachusetts ZEV Mandate?

State measures that would otherwise be preempted under section 209 are nevertheless permitted under section 177 if state standards for a particular model year are identical to "California standards for which a waiver has been granted for such model year" and if the standards were adopted at least two years before the model year begins. However, state regulations cannot "limit ... the manufacture or sale of a new motor vehicle ... that is certified in California" or "have the effect of creating, a motor vehicle ... different than a motor vehicle ... certified in California under California standards (a

'third vehicle') or otherwise create such a [7] third vehicle." For purposes of this analysis, the key issue regarding Massachusetts's ZEV mandate is whether the mandate is subject to the "identicality" criterion and, if so, whether it meets that criterion.[6]

1. Is the ZEV mandate subject to the identicality provision?

The first question is whether Massachusetts's mandate is subject to the identicality requirements of section 177. Massachusetts argues that the ZEV mandate is not subject to the identicality requirement because the identicality requirement applies only to standards and the ZEV mandate is not a standard, but an enforcement procedure. The manufacturers, on the other hand, argue that the ZEV mandate is a standard, and thus is covered by the identicality requirement. They also argue that the identicality requirement applies in any case to enforcement procedures, but they claim in their comments that EPA need not resolve that issue in this proceeding.

Is the Massachusetts ZEV Mandate a Standard?

i. Comments

Massachusetts argues in its comments that the ZEV mandate is not a standard relating to the control of emissions from new motor vehicles. It claims that the ZEV mandate has only a negligible impact on emissions. The purpose of the mandate is not to reduce emissions directly, but to create the conditions necessary for the implementation of the ZEV mandate in 2003. Massachusetts also states that the ZEV mandate is not a "quantitative standard" and should not be

6 The other issues were not raised in the litigation.



considered an emissions standard, citing *Adamo Wrecking Co. v. U.S.*, 434 U.S. 275, 285-89 (1978).[7] Massachusetts's comments are echoed by New York. New York claims that the ZEV mandate does not rise to the level of a standard but instead helps enforce compliance with the other standards in the LEV program. New York cites *Motor and Equipment Manufacturers Association v. EPA*, 627 F. 2d 1095 (D.C. Cir. 1979) ("*MEMA*"). In that case, the D.C. Circuit describes standards as regulations involving "quantitative levels of emissions" and measures that directly address air quality. *Id.*, at 1112-1113. New York claims that the ZEV requirement does not directly address air quality.

Automobile manufacturers argue that the ZEV mandate is a standard. They note that the 2nd Circuit has already found New York's ZEV mandate to be a standard. Further, they claim that the MEMA decision supports their argument because the ZEV mandate does affect emissions, in that it reduces levels of nitrogen oxides (NOx), carbon monoxide (CO), and evaporative [8] hydrocarbons (HCs). The manufacturers state that EPA has previously recognized that the ZEV mandate imposes direct air quality controls that are separate and distinct from the NMOG fleet average. 59 Fed. Reg. at 48,592 (Sept. 22, 1994) (Supplemental Notice of Proposed Rulemaking, Ozone Transport Commission LEV Program).

The manufacturers argue that the most simple standard requires 100% compliance, but a standard is no less a standard merely because it requires only a portion of the fleet to comply. They note that section 202(g) of the Act clearly

7 The court in that case found that the term "emission standard" under section 112 of the Clean Air Act, as in effect prior to 1977, was distinguishable from "design, equipment, work practice or operational standard(s)." *Id.*

states that the Tier I "standards" include both the emission levels and the phase-in associated with those levels.

Further, the manufacturers claim that as a practical matter, if state sales requirements need not be identical to California sales requirements, EPA will be giving other states more power than California, because they could then freely decide the number of clean vehicles sold in the state without having to get any approval from EPA regarding stringency or consistency with section 202(a), which are criteria that California must meet under section 209(b). According to the manufacturers, this is contrary to the intent of Congress in enacting section 177, which was to allow states to get needed emission reductions while not causing undue burden on manufacturers, which would occur if each state were allowed to pick its own production requirements. Manufacturers claim that allowing states to adopt their own ZEV mandates could create the "anarchic patchwork" that concerned Congress and the court in *MEMA*. *Id.*, at 1109.

On this issue, the state of California provided comments similar to those of the manufacturers.

ii. Analysis

EPA believes that the most appropriate interpretation of the language and policy goals of the statute is that Massachusetts's ZEV mandate is a standard for purposes of sections 171 and 209.

The language of the Act contemplates that a standard, for the purposes of sections 177 and 209, would include the requirement to produce a certain number or percentage of vehicles ("production requirement") to meet a numerical emissions limitation. The Clean Air Act does not define the term "standard relating to the control of emissions from new motor vehicles," as found in sections 177 and 209. However, in CAA section 202, which provides EPA's authority for promulgating standards applicable to emissions from motor



vehicles, the terms "standard" clearly encompasses both a numerical emission limitation and the number of vehicles that are subject to that limitation. For example, section 202(g), 42 U.S.C. § 7521(g), specifically requires EPA to promulgate "standards" that "provide that emissions from a percentage of each manufacturer's sales volume ... shall comply with the levels specified." Similarly, many current EPA motor vehicle regulations contain phase-in requirements or fleet averages, which EPA has promulgated [9] under its authority to issue standards under CAA section 202.[8] Part and parcel of the standard-setting authority is the authority to specify the number of vehicles produced by a manufacturer that are subject to particular emission limits. The flexibility to promulgate phase-ins, fleet standards, or a particular "mix" of standards in a particular year is an important aspect of EPA's standard-setting authority. There is little reason to believe that Congress intended a substantially different interpretation of "standard" under section 209 than that under section 202.

A numerical emission limit, by itself has no real meaning absent a tie to the kind and number of motor vehicles to which the limit applies. Setting the link between the emission limit and the applicability of the limit to a particular

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8 Percentage production requirements are similar to fleet average emission standards. Such fleetwide standards can easily be converted into percentage requirements, and vice versa. For example, regulations that require 40% of vehicles to meet a 1 gram standard and the rest to meet a 2 gram standard could easily be rewritten as a fleetwide average of 1.6 grams, with two sets of certification standards. EPA has already found that fleetwide average emission standards are "standards." See 62 Fed Reg. 31192, 31222 (June 6, 1997) ("the Agency may promulgate standards, such as fleet averages [and] phase-ins, that are fulfilled through compliance over an entire fleet, or a portion thereof, rather than through compliance by individual vehicles.")

number of vehicles is an inherent part of the standard setting process. This process specifies the level of emissions or emissions reductions that is expected from a manufacturer and establishes the amount of emissions reductions expected from the standard setting process. If a production requirement, such as the ZEV mandate, is not considered part of the standard itself, then compliance with a standard (i.e., the numerical emission limitation) would be disconnected from the obligation to build cars to meet the standard. This could lead to emission standards that have no air quality benefit at all.

This combination of an emissions limit and a requirement to produce vehicles meeting that limit is key to evaluating certain central issues in standard setting. For example, consideration of cost, availability of technology, and resulting emissions reductions all require that both the numerical limit and the applicability of the limit be considered. EPA's obligation to consider these factors in setting emissions standards, and in considering California's requests for waivers from preemption under section 209(b), indicates that the requirement to produce vehicles is in fact part of the emission standard. See sections 202(a), 209(b), 213(a)(3), (4) and (5). For example, under section 209(b), EPA must determine whether California is arbitrary in its determination that its standards are "in the aggregate, at least as protective of public health and welfare as applicable Federal standards." It would be difficult for EPA to make such a determination if it did not review the obligation of manufacturers to build their vehicles, or a portion of their vehicles, to meet California's standards.

Enforcement provisions, by contrast, are designed not to provide a certain level of emission reductions directly, but instead to ensure that the level of emissions reductions expected from the standards actually occur. See *Cahill*, 152 F. 3d at 200. If all requirements considered to be enforcement measures were deleted, and the manufacturers



still complied with the [10] requirements considered to be standards, emissions would still be reduced to the levels expected when the standard was set. Since production requirements directly affect the emission reductions from a regulation, rather than ensuring that such reductions occur, they should be seen as an inherent part of motor vehicle emission standards, not enforcement provisions.

The policies underlying section 177 also indicate that the ZEV mandate should be considered a standard, because if production requirements are not standards, then other states could enact production requirements that were different from California's requirements substantially undercutting Congress's intent under section 177 to prevent manufacturers from being required to build different vehicles for various state programs. Section 177 was enacted to allow states to require emission reductions from new motor vehicles without causing vehicle manufacturers the undue burden of having to meet different standards in different states.[9] California was to be the model for all other states to follow. EPA could be assured that state regulations were technologically feasible and at least as stringent as federal regulations because EPA would have already found California's regulations to meet those requirements under section 209(b).

However, if other states are not limited to the production mandates in California's regulations, this attachment to California's program would be diminished. California would no longer be the model for state programs. Further, EPA's evaluation of California's program under section 209(b)

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9 See, e.g., 123 Cong. Rec. 17,765, 17,766 (June 7, 1977) (Statement of Sen. Anderson regarding section later adopted) ("The language in my amendment... would allow only the present two-car strategy to extend to other States. ... No additional certification of different kinds of cars will be required and no new standards will be created.")

might no longer be relevant for programs enacted by other states. Since such states are not subject to EPA review under section 177 or 209, states would be free to create their own programs without any oversight from EPA. Such states would therefore have substantially more freedom than even California to design their own motor vehicle programs. Manufacturers could be forced to build different numbers or percentages of vehicles to meet the requirements of different states. For example, a state could turn a relatively slow phase-in of a new standard under California's requirements into an immediate requirement for 100% compliance. Because EPA's review of California's motor vehicle program under section 209(b) presumed California's slow phase-in, the other state's revised program with an immediate 100% requirement would have escaped all EPA review, which may lead to the enactment of an infeasible requirement in the other state.

Massachusetts's argument regarding the negligible emissions impact of the ZEV mandate is unpersuasive. The small effect on emissions is related only to the number of ZEVs being required not to the issue of whether the mandate is a standard. If a mandate requiring production of a small number of ZEVs is not a standard, it is difficult to see why a mandate for a larger number would be a standard. They are the same type of regulation. In any case, the ZEV mandate would clearly have an impact, however small, on emissions. In particular, emissions [11] from those vehicles specifically subject to the mandate would be substantially affected by the mandate.

In fact, Massachusetts's argument would allow a state to impose the burden on industry that section 177 seeks to avoid, while achieving little or none of the emissions benefits contemplated by section 177. Massachusetts's ZEV mandate requires ZEVs to be delivered for sale in Massachusetts. But for that mandate, manufacturers would not have to produce any ZEV; for sale in Massachusetts from 1998-2000. If the



Massachusetts ZEV requirement is different from California's requirement, manufacturers would indeed be subject to different production requirements in different states. This could impose the kind of burden on industry that section 177 was designed to prevent. However, Massachusetts claims that the negligible emissions benefits of the mandate should excuse Massachusetts from the identicality requirement. Yet the purpose of section 177 is to allow states other than California to obtain needed emission reductions from vehicles.

Finding that the Massachusetts ZEV mandate is a standard is also consistent with the view of the Second Circuit, which reviewed virtually the same issue in *Cahill*. In that case, the court ruled that New York's ZEV mandate was an emission standard. The court ruled that standards are "regulatory measures intended to lower the level of auto emissions, while 'enforcement mechanisms' describe regulatory devices intended to ensure standards are effective. ... [T]he ZEV sales requirement must be considered a standard 'relating to the control of emissions.' ZEV, after all, stands for 'zero-emission vehicle,' and a requirement that a particular percentage of vehicle sales be ZEVs has no purpose other than to effect a general reduction in emissions." *Id.* at 200.[10]

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10 The two cases cited by Massachusetts and New York are not helpful to them. The *MEMA* case concerned an in-use compliance provision that clearly was an enforcement treasure. The opinion contains dicta that are helpful to either argument. Even assuming the *Adamo* case was ever relevant to the determination of standard under Title II (as the *MEMA* court suggests, 627 F.2d at 1112 n.35, the word "standard" as used in Title II is distinguishable from its use in the rest of the Act), it is no longer because Congress has legislatively overruled *Adamo* twice, increasing the scope of the term "emission standard" under section 112, and the rest of the Act, to include the work practice requirements disallowed in *Adamo*. Compare section

(Continued...)

EPA therefore believes that the Massachusetts ZEV mandate is a standard for purposes of sections 177 and 209 and is subject to the "identicality provision" in section 177.[11] [12]

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302(k), 42 U.S.C. §7602(k) as revised in 1990, to the same section prior to 1990. See also CAA section 112(e)(5), 42 U.S.C. § 7412(e)(5), as in effect prior to 1990, which was enacted in 1979 as a direct response to *Adamo*, 92 Stat. 3443, 3457.

11 The manufacturers also argue that even if the ZEV mandate is not a standard, regulations other than standards are subject to the identicality requirement under section 177. This issue is relevant not only for evaluation of the ZEV production mandate, but for evaluation of Massachusetts's ZEV reporting requirements. In the context of EPA's conclusion with regard to the proper scope of "standards" under sections 177 and 209, EPA disagrees with manufacturers' argument that requirements other than standards are subject to the identicality requirement. In enacting sections 209 and 177, Congress was careful in its use of the terms "standards" and "accompanying enforcement procedures." See *MEMA*, 627 F. 2d at 1113. Within section 209, subsections (a), (b)(1)(C) and (e)(2)(B) all specifically differentiate between standards and other types of requirements, which would be unnecessary if standards were meant to include other types of requirements. It is clear that Congress understood the difference between these terms when it promulgated section 177. Therefore, the fact that the identicality provision applies on its face only to standards is strong evidence that requirements other than standards are not covered by that requirement. The Second Circuit reached this conclusion in *Motor Vehicle Manufacturers Ass'n v. New York*; 79 F. 3d 1298, 1305-06 (2nd Cir. 1996). The history of section 177 also supports this analysis. In 1990, Congress revised section 177 to prevent states from taking any action to create a "third vehicle." As the Second Circuit recognized in *Motor Vehicle Manufacturers Ass'n v New York*, 17 F. 3d 521, 537 (2nd Cir. 1994), a clear purpose of this "third vehicle" prohibition was to prevent states from administering and enforcing standards in such a manner as to effectively require a third vehicle. If the identicality requirement applied to enforcement procedures, the "third vehicle prohibition" would be unnecessary, as identical

(Continued...)



2. Is the ZEV mandate identical to a California standard that has received a waiver for the same model years?

(a) Are California's MOAs standards under sections 209 and 177?

i. Comments

Massachusetts argues that California's MOAs are regulations in all but name, and thus are standards under section 209(a) regardless of form. According to Massachusetts, the term "standards" can mean regulatory standards or contractual standards. Massachusetts states that the MOAs are one-sided and manufacturers pay a heavy penalty (enforceable liquidated damages) for failure to deliver, which indicates their similarity to regulatory standards. Massachusetts claims that the MOAs are an attempt by auto manufacturers to avoid regulation by states other than California. Massachusetts claims that allowing this type of contractual arrangement would [13] give California unreviewable discretion to decide the scope of

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enforcement procedures could never create a third vehicle. Moreover, the legislative history of this 1990 amendment makes clear that Congress intended states to retain their ability to enforce California's standards through regulations that need not meet the identicality requirements of section 177. Statement of Sen. Baucus, 136 Cong. Rec. S16976 (Oct. 27, 1990) (noting that Congress reaffirmed the pre-existing EPA position that state enforcement procedures need not be identical to California's). Moreover, as noted by the Second Circuit, "it is understandable that Congress did not limit states in this way -- enforcement techniques will necessarily vary from state to state." *Motor Vehicle Manufacturers Assn v. New York*, 79 F. 3d at 1306.

other states' programs and urges EPA to close the door on this device to prevent attacks on section 177.

New York echoes Massachusetts's arguments, saying that the MOAs undercut Congress's framework under section 177 and saying that California has grossly abused its powers.

California and the automobile manufacturers argue that the MOAs are not standards and should not be subject to preemption under section 209. They argue that Clean Air Act section 302(k) defines an emission standard as a "requirement established" by EPA or a state, thus implying unilateral regulatory action, not contractual action. Section 209 speaks of "adopting" a standard, which also implies regulatory action, not contractual action.

California and the manufacturers note that the MOAs are contracts and were not adopted by regulation. They argue that federal preemption of state action generally, and the provisions of section 209 in particular, apply only to regulations, and do not preempt a state's ability to contract. See *Building and Construction Trades Council v. Associated Builders and Contractors of Massachusetts*, 507 U. S. 218, 226-27 (1993) and *American Airlines Inc. v. Wolens*, 513 U.S. 219, 229 (1995). These commenters claim that the case cited by the 1st Circuit, *Wisconsin Dep't of Industry v. Gould*, 475 U.S. 282 (1986) is not on point because the Supreme Court in that case invalidated a state statute, not a contract.

California and the manufacturers further argue that Congress never contemplated that a voluntary agreement between California and a manufacturer could be transformed into a binding commitment unilaterally imposed by another state. Section 209(a) was, they argue, designed to protect manufacturers from being forced into a patchwork of regulations, not to prevent voluntary actions. California and other states have previously entered into settlement agreements and other voluntary agreements similar to the



MOAs. According to California and the manufacturers, a decision that California's MOAs are covered by section 209 would preempt such voluntary agreements by all states.

California notes that EPA is not precluded from reviewing California's MOAs under the criteria of section 209(b) if the existence o f the MOAs calls California's protectiveness finding into question. California also notes that Congress specifically gave it extra powers because of its unique air quality problems and its trailblazing in the automobile emission control arena. California claims that the spurring of technological development is one of its most important functions in the Congressional scheme and will ultimately help the whole country. According to California, the MOAs, which create demonstration programs for advanced technology ZEVs, are consistent with Congress's intent. The limited MOAs are, in California's view, the best way to introduce these ZEVs. The automobile manufacturers claim that they need to focus their development efforts on California projects without having to meet widespread requirements in other states before they are ready for commercial distribution. [14]

ii. Analysis

Given the unique factual circumstances surrounding these MOAs, EPA believes that the provisions of the MOAs requiring the placement of ZEVs in California should be considered standards adopted by California for purposes of section 177 and 209(a). Though the MOAs on their face are non-regulatory contractual agreements, the background for the MOAs indicate that they grew directly out of the ZEV regulatory requirements that were in place for the 1998-2002 model years prior to California removing them and were intended to stand in the place of and perform the function of these regulatory requirements, albeit with certain changes (e.g., the number of vehicles affected). Moreover, it appears from the record that the MOAs were developed as

contractual agreements, rather than regulatory standards, with an intention from the manufacturers' standpoint to limit the ability of other states to adopt the new provisions, thus effectively negating the will of Congress in enacting section 177.

EPA believes that in general, provisions in voluntary agreements ordinarily should not be considered "standards" subject to section 209(a). The language of the statute appears to indicate that provisions in voluntary agreements should not generally be considered standards under section 209. The legislative history of section 209 also appears to indicate that the prohibition in section 209 is meant to apply to state mandates (regulations and laws), not voluntary agreements. *See discussion, id.* at 23.

Moreover, if production requirements in voluntary agreements were generally preempted, then every such requirement in agreements in every state would be preempted. For example, any contractual agreement between a state and manufacturers to sell low emission vehicles in the state would be preempted. Since only California could overcome preemption through section 209(b), such agreements by all other states would violate the Clean Air Act, unless the relevant provisions were identical to those made by California. EPA believes it would be an inappropriate interpretation of section 209(a) to treat all such agreements as prohibited. Today's decision is limited to the unique circumstances of this case, and is not intended in any way to extend the scope of section 209 beyond regulatory requirements and the specific kind of circumstances considered here.

Massachusetts, however, does not assert that all types of agreements are *per se* preempted under section 209. Massachusetts instead argues that the California MOAs are really regulations in substance, and therefore are subject to section 209 and contain standards that can be copied by other



states. California, on the other hand, emphasizes the "demonstration" aspects of the MOAs, and the fact that many provisions in the MOAs, like California's agreement to facilitate infrastructure, are not elements that would normally appear in state regulations.

EPA believes that the MOAs should be treated as standards adopted by California, based on the circumstances presented in this case. A binding regulatory requirement has in effect been replaced by a binding contractual arrangement. The contractual provisions address the same central issue of ZEV production requirements. In this case, the record indicates that the parties [15] intended these provisions to perform the function and take the place of regulatory revisions, with the attendant benefits to the parties of such revisions. Absent the more stringent regulatory requirements they replaced, the agreements arguably would not have been entered into. Moreover, just as the mere fact that the Massachusetts program involves only a small number of vehicles is not relevant" to a determination whether that program is a "standard" under the Act, the fact that California asserts that it has created only a technology demonstration program is not relevant to a determination under section 209(a) regarding whether the program creates a standard.

The potentially severe liquidated damages resulting from a manufacturer's failure to comply with the MOAs, the manner in which such liquidated damages are decided (initial determination from the CARB Executive Officer, and *de novo* review by the Board, followed by *de novo* court review) and the lack of similar provisions in case of breach by California, perform the function of assessment of civil penalties for breach of a regulatory requirement. These contractual enforcement provisions provide an assurance to California comparable to the preexisting regulatory requirements. In addition, the MOAs were also entered into with an intention by the manufacturers to limit the ability of

other states to adopt the new provisions under section 177. *AAMA II*, Brief for the Appellant, pp. 30-32; Letter from Kathleen Walsh, General Counsel, California Air Resources Board, to Jane Armstrong, Director, EPA Vehicle Programs and Compliance Division, dated May 16, 1997 (Docket No. A-99-08, Document No. II-D-04). These specific MOAs function as, and should be treated for the purposes of sections 209 and 177 as, standards in the nature of revisions to the preexisting regulatory ZEV mandate for the 1998-2002 time frame.

EPA is also concerned that not treating these MOAs as standards could encourage California and manufacturers to implement many regulatory measures using this approach, thereby both preventing other states from implementing such measures and escaping EPA review under section 209. EPA agrees with California that the latter concern is tempered because California will ultimately need to show that its motor vehicle regulatory program (i.e., those measures that are in California's regulations) is in the aggregate as stringent as federal measures; however, even within that framework, California and manufacturers would have considerable ability to avoid the prescriptions of sections 209 and 177 through voluntary agreements.

Many of the arguments raised by California and the automobile manufacturers relate to the argument that voluntary arrangements are generally not covered by sections 209 and 177. As indicated above, EPA agrees with California and the manufacturers that generally such arrangements would not be covered by those sections. However, the unique circumstances of these MOAs clearly indicate that despite the "form" of the documents as contracts, the measures should be treated as standards adopted by California for the purposes of sections 177 and 209. Moreover, the argument that this result is contrary to the intent of Congress is not persuasive, given that Congress clearly intended that other states should have the right to



copy California's motor vehicle standards, which is what Massachusetts intended.

[16] Thus, given the facts of this case, for purposes of CAA sections 209 and 177, the MOAs should be considered standards adopted by California. Thus, Massachusetts may use their existence to justify their ZEV standards under section 177.

(b) Are Massachusetts Standards Identical to California's

*i. Comments*

Manufacturers claim that California bound itself to infrastructure changes that are important for introduction of ZEVs. These obligations are not in Massachusetts's regulations. Thus, the manufacturers claim that Massachusetts's regulations are in any case not identical to the MOAs.

Massachusetts states in its brief that the obligations of California are not "reciprocal" to manufacturers' requirements because the obligations are not dependent upon one another. Also, Massachusetts claims that CARB's obligations are not standards under sections 177 and 209.

*ii. Analysis*

EPA believes that Massachusetts's standards are identical to California's standards. California's commitments under the MOAs are clearly not "standards relating to the control of emissions from new motor vehicles" as that term is used under sections 177 and 209. Nor are they pre-conditions upon which the manufacturers' obligations are dependent. They are merely obligations regarding infrastructure that apply to California, not the manufacturers.

(c) Are the ZEV-Related Portions of California's MOAs Covered By a Waiver?

*i. Comments*

Manufacturers argued in their brief that Massachusetts' ZEV mandate is preempted because California has not received, or even requested, a waiver for the ZEV mandate in the MOAs. Manufacturers claim that Massachusetts may not rely on the waiver for California's pre-existing ZEV mandate because California's ZEV mandate for 1998-2002 has been repealed and because Massachusetts' ZEV mandate is "very different" from the original mandate.

Massachusetts argued in its brief that the ZEV mandate in the California MOAs is within the scope of the original waiver granted for California's ZEV mandate. Massachusetts notes that California need not seek a new waiver with respect to modification of standards for which EPA has already granted a waiver if the modifications do not undermine the initial decision of the Agency. Massachusetts claims that the relaxation of the ZEV mandate from the initial waiver to the MOAs does not undermine the finding from the initial waiver that California's programs is "in [17] the aggregate, at least as protective of public health and welfare as applicable Federal standards' because the vast majority of the emissions reductions in the LEV program are accounted for by the NMOG fleet average standards and the bin structure of the regulations, not the ZEV mandate. Massachusetts also notes that the relaxation of the ZEV requirements make compliance easier, thus not implicating the requirement of section 209(b) that California standards be "consistent with section 202(a)." California states, without analysis, its belief that if the ZEV provisions of the MOAs were adopted as standards, they would be within the scope of the previous waiver.



ii. Analysis

EPA believes that the ZEV requirements in the MOAs are within the scope of the original waiver granted for California's LEV program in 1993. EPA has long recognized that once the Agency has granted a waiver of preemption for a California regulation, revisions to that regulation may be considered within-the-scope of the initial waiver, and thus not require a new waiver, if the revisions 1) do not undermine California's determination that its standards, in the aggregate, are as protective of human health and welfare as comparable Federal standards; 2) are not inconsistent with section 202(a) of the Act; and 3) raise no new issues affecting the initial waiver.

Massachusetts is correct that the reduction in size of the ZEV mandate from 1998-2002 does not undermine California's "in-the-aggregate" determination. The ZEV mandate was responsible for only a small portion of the emission reductions in the LEV program. The NMOG fleet average, which remains in place, is responsible for the vast majority of emission reductions from the LEV program. EPA has received no information to indicate that the MOA ZEV requirements would violate section 202(a) of the Act, which deal with technological feasibility and lead time. As Massachusetts notes, the fact that the MOA requirement actually reduce significantly the requirement to produce ZEVs in the 1998-2002 time frame, compared to the requirements for which EPA has granted a waiver, indicates that the requirements of section 202(a) have been met. Nor does the new ZEV requirement raise any new issues affecting the initial waiver, beyond the issues discussed above. EPA will be providing a more detailed discussion of these issues shortly in the context of its response to California's request for a within-the-scope determination of its revisions to its LEV regulations. [18]

III. Conclusion

For the reasons provided above, EPA believes that under these unique circumstances, "Massachusetts's ZEV mandate is identical to a standard that California has adopted for model years 1998-2000. It is therefore permitted under CAA sections 209 and 177.[12]

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12 On August 4, 1999, President Clinton signed Executive Order 13132 on federalism ("EO 13132"). 64 Fed. Reg. 43255 (Aug. 10, 1999). EO 13132 is not effective until November 2, 1999; however, the previous Executive Order on federalism, EO 12612, which is revoked by EO 13132, remains in effect until that date. It is unclear whether this document would be subject to EO 13132 or EO 12612 as a "policy that has federal implications" or an "action limiting the policy discretion of the States." See sections 1(a) and 3(b) of both orders. In any case, EPA has, consistent with section 3(a) of both orders, closely examined the basis for the opinions contained in this document, as provided above. The problems that led Congress to enact sections 209 and 177, in particular, the need to protect interstate commerce by preventing a patchwork of differing state standards while ensuring the ability of states to enact motor vehicle standards more stringent than federal standards, are clearly problems of national significance, appropriate for national activity under section 3(b) of both orders. EPA has also consulted with states, and received comments from several states in the process of issuing this document Section 4(c) of the orders indicates that executive departments and agencies should restrict regulatory preemption of state law to the minimum level necessary to achieve the objectives of the statute. Consistent with section 4(c), the interpretations provided in this document were developed with particular concern for ensuring that preemption of state actions are minimized to the extent possible to achieve the goals of the Clean Air Act.

59 (159D)

No. 02-1343

(12)

Supreme Court, U.S.
FILED
AUG 29 2003
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

ENGINE MANUFACTURERS ASSOCIATION AND
WESTERN STATES PETROLEUM ASSOCIATION,

*Petitioners,*

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, *et al.*,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## *AMICI CURIAE* BRIEF OF AMERICAN ROAD & TRANSPORTATION BUILDERS ASSOCIATION, AMERICAN TRUCKING ASSOCIATIONS, INC., TAXICAB, LIMOUSINE & PARATRANSIT ASSOCIATION, NATIONAL ASSOCIATION OF HOME BUILDERS, AND CONSTRUCTION INDUSTRY AIR QUALITY COALITION IN SUPPORT OF PETITIONERS

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August 29, 2003

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## IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

*Amicus curiae* American Road & Transportation Builders Association ("ARTBA"), a nonprofit trade organization, headquartered in Washington, D.C., represents the collective interests of the U.S. transportation construction industry before the national executive, legislative, and judicial branches of government. As an umbrella group for more than 5,000 members from all sectors and modes of the transportation construction industry (including public transit, airports, and waterways), ARTBA is the industry's primary advocate in environmental regulatory actions and litigation.

*Amicus curiae* American Trucking Associations, Inc. ("ATA"), a nonprofit District of Columbia corporation headquartered in Alexandria, Virginia, is the national trade association of the trucking industry. ATA has over 1,800 direct motor carrier members and, in cooperation with state trucking associations and affiliated national trucking conferences, represents more than 37,000 trucking companies. ATA represents every type and geographical scope of motor carrier operation in the United States, including for-hire carriers, private carriers, leasing companies, and others.

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the timely filing of all *amici curiae* briefs in this matter. The parties' letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6 of the Rules of this Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

*Amicus curiae* Taxicab, Limousine & Paratransit Association ("TLPA"), headquartered in Kensington, Maryland, is a nonprofit trade organization for the private passenger transportation industry. TLPA's membership includes approximately 1,100 taxicab companies, executive sedan and limousine services, airport shuttle fleets, non-emergency medical transportation companies, and paratransit services worldwide. TLPA is the leading information, education, and legislative resource in the private, ground-passenger transportation industry.

*Amicus curiae* National Association of Home Builders ("NAHB"), headquartered in Washington, D.C., is a nonprofit trade organization representing over 211,000 builder and associate members throughout the United States. NAHB membership includes individuals and firms that construct and supply single-family homes, as well as apartments, condominium, commercial and industrial properties. In addition, NAHB represents a large number of land developers and remodelers. It is the voice of the American shelter industry. NAHB's goals are to promote home ownership; foster a healthy and efficient housing industry; and promote policies that will keep safe, decent, and affordable housing a national priority.

*Amicus curiae* Construction Industry Air Quality Coalition ("CIAQC"), headquartered in West Covina, California, is a non-profit trade association comprised of the four major construction and building industry associations in Southern California: the Associated General Contractors of California, the Building Industry Association of Southern California, the Engineering Contractors Association, and the Southern California Contractors Association. In all, CIAQC represents approximately 3,300 member companies



throughout Southern California. CIAQC was formed in 1989 to promote the adoption and implementation of emission reduction measures that are both cost-effective and efficient, while minimizing adverse impacts on its construction and building industry members. Since its inception, CIAQC has actively participated in many of the important discussions on how to achieve both federal and California state air quality standards.

The rules at issue in this litigation require members of ARTBA, ATA, and TLPA to purchase vehicles from a more expensive and operationally burdensome subset of vehicles than is otherwise available for purchase in California. Moreover, if this Court affirms the decision below, respondent South Coast Air Quality Management District ("SCAQMD") and other local jurisdictions nationwide could adopt similar regulations, thereby imposing a patchwork of additional burdens on members of ARTBA, ATA, TLPA, NAHB, and CIAQC.

## ISSUE PRESENTED

This case poses one purely legal issue: does the federal Clean Air Act, 42 U.S.C. §§ 7401-7671q (2000) ("FCAA"), preempt political subdivisions such as SCAQMD from restricting the types of FCAA-certified vehicles that a fleet operator (or any other person) may purchase?

## SUMMARY OF ARGUMENT

Under FCAA § 209(a)'s sweeping language, "No State *or any political subdivision thereof* shall adopt or attempt to enforce *any standard relating to the control of emissions* from new motor vehicles or new motor vehicle engines subject to this part." 42 U.S.C. § 7543(a) (emphasis

added). FCAA § 209(b) authorizes only the *State* of California to seek a waiver of this preemption for California vehicle standards that meet certain conditions. 42 U.S.C. § 7543(b). This broad preemption leaves no room for political subdivisions such as SCAQMD to adopt motor vehicle emission standards.

By lifting and reordering disparate excerpts of statutory text and legislative history, the decisions below inappropriately narrow the preemptive scope of FCAA § 209. *SCAQMD v. EMA,* 158 F. Supp. 2d 1107 (C.D. Cal. 2001) ("*SCAQMD*"), *aff'd,* 309 F.3d 550 (9th Cir. 2002).[2] By contrast, when Congress enacted FCAA § 209 in 1967, it clearly and manifestly preempted local governments such as SCAQMD from subjecting vehicle manufacturers, dealers, consumers, and users to standards such as the challenged rules. Moreover, Congress legislated in a field (namely, automobile emission standards) without a history of state or local involvement and carved out a special role for the one state (California) that recently had pioneered regulation in that field.

Further, in *each* post-1967 amendment, Congress *reinforced* its clear distinctions between the standard-setting available to California, the adoption of identical such standards by other *states,* and the *complete preemption of local controls.* Thus, nowhere has Congress repealed by implication the clear and manifest preemption it expressly adopted in 1967. Finally, even assuming *arguendo* that the

[2] For clarity, *amici* cite to the district court decision, which the Ninth Circuit adopted in its two-sentence opinion. 309 F.3d 550 & n.1.



SCAQMD rules could survive FCAA § 209's express preemption, they nevertheless conflict with the FCAA's Clean Fuel Fleet Program, which therefore preempts them under conflict preemption.

## REGULATORY BACKGROUND

*Amici* adopt the facts and background from petitioners' brief, *see* Pet. Br., at 8-13, but highlight here two specific examples to demonstrate how the SCAQMD rules create distinct standards. First, SCAQMD Rule 1194(d) requires certain airport ground access fleets to purchase only vehicles that meet or exceed California's standard for Ultra-Low Emission Vehicles ("ULEVs"), notwithstanding that other Californians may purchase vehicles meeting a wider range of emissions standards. Specifically, ULEVs must meet a nonmethane organic gas standard of 0.040 grams/mile, whereas California vehicles in the same class lawfully may emit more than three times that amount (0.125 grams/mile). Cal. Code Regs. tit. 13, § 1960.1(g)(1) (2002).

Second, SCAQMD Rule 1196(d) requires heavy-duty vehicle fleet operators to purchase only vehicles that are powered by fuels other than diesel and that meet California's standard for alternatively-fueled heavy-duty vehicles, notwithstanding that other Californians may purchase diesel vehicles and/or vehicles with higher emissions. *See* Cal. Code Regs. tit. 13, § 1956.8(a)(1) (2002). Further, although SCAQMD Rule 1196(d)(2) allows fleet operators to purchase vehicles powered by both diesel and an alternative fuel, the rule requires such "dual-fuel" vehicle to meet an otherwise optional statewide emission limits for oxides of nitrogen (currently 2.5 grams/brake horsepower-hour) in place of the otherwise applicable California limit (currently

4.0 grams/brake horsepower-hour). *See* SCAQMD Rule 1196(c)(3); Cal. Code Regs. tit. 13, § 1956.8(a)(1).

## PREEMPTION STANDARD

Under the Supremacy Clause, federal law preempts state law whenever the two conflict. U.S. CONST. Art. VI, cl. 2. "State action may be foreclosed by express language in a congressional enactment, by implication from the depth and breadth of a congressional scheme that occupies the legislative field, or by implication because of a conflict with a congressional enactment." *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 541 (2001) (citations omitted).

In determining the preemptive scope of a federal statute, congressional intent controls. *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 516-17 (1992); *United States v. Locke,* 529 U.S. 89, 106 (2000). Congressional intent may be "explicitly stated in the [federal] statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.,* 430 U.S. 519, 525 (1977). Where Congress states its preemptive intent explicitly, a court's only task is to determine the preemptive scope of the statute. *Cipollone,* 505 U.S. at 517. Preemption analysis begins with the plain wording of the federal statute, which "necessarily contains the best evidence of Congress' pre-emptive intent," *CSX Transp., Inc.* v. *Easterwood,* 507 U.S. 658, 664 (1993), and the ordinary meaning of statutory language presumptively expresses that intent. *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992).

When Congress legislates in a field that the states traditionally have occupied, courts will not assume preemption "unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.,* 331 U.S.



218, 230 (1947). As this Court recently recognized, however, *Santa Fe Elevator* applies only when the states traditionally have occupied the field and not when there is a history of significant federal presence. *Locke,* 529 U.S. at 107-08 (*citing Santa Fe Elevator Corp.,* 331 U.S. at 230); *accord Buckman Co. v. Plaintiffs' Legal Committee,* 531 U.S. 341, 347 (2001).

## I. THE AIR QUALITY ACT OF 1967 CLEARLY AND MANIFESTLY PREEMPTS STATE AND LOCAL EMISSION STANDARDS ON MOTOR VEHICLE MANUFACTURERS, DEALERS, CONSUMERS, AND USERS

Congress entered the field of motor vehicle emission controls in three phases over four years. First, in the Clean Air Act of 1963, Congress required the Secretary of Health, Education & Welfare to "encourage the continued efforts" of the automotive and fuel industries to develop devices and fuels that prevent the discharge of pollutants from "automotive vehicles." Pub. L. No. 88-206, § 6, 77 Stat. 392, 399 (1963). Two years later, Congress expanded the federal presence by requiring the Secretary to promulgate emission-control regulations for new motor vehicles. Pub. L. No. 89-272, § 202, 79 Stat. 992 (1965) (*codified as amended at* 42 U.S.C. § 7521). Finally, in the Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485 (1967), Congress further expanded the federal presence and, for the first time, expressly preempted state and local emission-control standards for new motor vehicles:

> No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new

> motor vehicles or new motor vehicle engines subject to this title.

Pub. L. No. 90-148, § 208(a), 81 Stat. at 501 (*codified at* 42 U.S.C. § 7543(a)).[3] Because California had a uniquely severe air quality problem, and because California recently had pioneered vehicular air pollution controls, the 1967 amendments authorize the State of California – and only the *State* of California[4] – to adopt vehicle standards and to seek a waiver of federal preemption for those standards. S. Rep. No. 90-403, at 33 (1967); Pub. L. No. 90-148, § 208(b), 81 Stat. at 501 (*codified as amended at* 42 U.S.C. § 7543(b)).

Thus, Congress clearly preempted both *state and local* authority. *See* 42 U.S.C. § 7543(a). Where Congress provided for a possible limited waiver of the preemption, Congress did so only for a single *state*. *See* 42 U.S.C. § 7543(b). The clarity and consistency of this statutory distinction is fundamental to the preemption analysis.

> Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the

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[3] The Clean Air Act Amendments of 1970 recodified § 208 of the Air Quality Act of 1967 to its current location as FCAA § 209. Pub. L. No. 91-604, § 8(a), 84 Stat. 1676, 1976-77 (1970). For consistency, throughout this brief, *amici* refer to this provision as "FCAA § 209."

[4] Although the statutory waiver-of-preemption language applies generally to any state that adopted certain emission standards prior to 1966, only California had done so. S. Rep. No. 90-403, at 6, 33 (1967).



> absence of evidence of a contrary legislative intent.

*TRW, Inc. v. Andrews,* 534 U.S. 19, 28 (2001) (*quoting Andrus v. Glover Constr. Co.,* 446 U.S. 608, 616 (1980)). Thus, before Congress amended it in 1970, 1977, and 1990, the Clean Air Act unmistakably preempted all states except California and all political subdivisions from adopting or enforcing any standards relating to emissions from new motor vehicles.

As used in FCAA § 209, the term "standard" has been held to include both a numerical limit on emissions, *Motor & Equipment Mfrs. Ass'n, Inc., v. Environmental Protection Agency,* 627 F.2d 1095, 1111-12 (D.C. Cir. 1979) ("*MEMA*"), *cert. denied sub nom., General Motors Corp. v. Costle,* 446 U.S. 952 (1980), and, more generally, any "regulatory measures intended to lower . . . emissions," *Motor Vehicle Mfrs. Ass'n v. Cahill,* 152 F.3d 196, 200 (2nd Cir. 1998).[5] Both fit within the plain meaning of the statutory phrase "any standard," *see, e.g.,* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 1690 (4th ed. 2000) ("measure of comparison for quantitative or qualitative value; a criterion"), which provides the best measure of congressional intent, *Morales*, 504 U.S. at 383.

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[5] *Accord Association of Int'l Automobile Manufacturer v. Comm'n,* 208 F.3d 1, 6-7 (1st Cir. 2000) ("*AIAM*"). The *AIAM* court concurred with the *Cahill* court's definition of "standard," the same one proffered by the Environmental Protection Agency ("EPA") in an opinion filed at the AIAM court's request. *See id.* (*citing* EPA, "Opinion on Issues Raised by *AAMA v. Massachusetts DEP,*" 9-10 (Sept. 15, 1999)).

Because the SCAQMD Fleet Rules selectively adopt a more-stringent subset of the applicable *California standards* as the *only SCAQMD standard* applicable to fleet operators, SCAQMD has created new emission standards for those fleet operators. For example, as noted in the Regulatory Background, *supra*, an airport ground access fleet operator must meet an emission standard of 0.040 grams/mile, notwithstanding that the statewide limit is 0.125 grams/mile. Even where they do not expressly set a quantitative emission limit, however, the SCAQMD rules nevertheless constitute a qualitative standard intended to lower emissions. For example, the Fleet Rules all impose restrictions on the type of fuel a fleet vehicle may use. *See* Pet. Br., at 11-13. Fuel type, in turn, is a factor that the Clean Air Act expressly lists as a basis for defining the applicability of a vehicular emission standard to a particular class or category of vehicles. 42 U.S.C. § 7521(a)(3)(ii).

To further broaden the scope of preempted state and local regulation, Congress preempted not just any emission-control standard, but "any standard *relating to* the control of emissions." *See* 42 U.S.C. § 7543(a) (emphasis added). Acknowledging that "relates to" preemption does not "extend to the furthest stretch of indeterminacy," *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 655 (1995), this Court pragmatically reviews such cases for state requirements with a "forbidden connection" to the federal law, considering the federal statute's objectives and the effect of the state requirement on the federal statute.



*Egelhoff v. Egelhoff*, 532 US 141, 147 (2001).[6] Given that both SCAQMD's rules and FCAA § 209 concern motor vehicle emissions and (as discussed, *infra*) that FCAA preemption protects users and consumers, the SCAQMD rules all have a "forbidden connection" to FCAA § 209(a).

Like the statutory text, the legislative history leaves no doubt that Congress clearly and manifestly intended to preempt state and local regulation of vehicular emission standards:

> The Congress is therefore presented directly with the question of the extent to which the Federal standards should supersede State and local laws on emissions from motor vehicles. . . . . Rather than leave this question to the uncertainties involved in litigation, the committee has agreed . . . that State *laws applicable to the control of emissions* from new motor vehicles or new motor vehicle engines *are superseded*. The committee feels that a provision such as this is necessary in order to prevent a chaotic situation from

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[6] Although *Egelhoff* concerned a Washington statute, the "relating to" analysis applies equally to all state and local government actions that relate to emissions. A reading that preempts only actions that affirmatively prescribe emission rates "simply reads the words 'relating to' out of the statute. Had the statute been designed to pre-empt state law in such a limited fashion, it would have forbidden the States to 'regulate [emissions],'" *Morales*, 504 U.S. at 385, rather than prohibiting their adopting or enforcing any standard that relates to the control of emissions.

> developing in interstate commerce in new motor vehicles.

H.R. Rep. No. 90-728 (1967) (*reprinted in* 1967 U.S.C.C.A.N., 1956) (emphasis added).

The legislative history is equally clear that the FCAA's broad preemption protects not only manufacturers, but also dealers, consumers, and users:

> [I]t would be more desirable to have national standards rather than for each State to have a variation in standards *and requirements* which could result in chaos insofar as manufacturers, dealers, *and users* are concerned.

H.R. Rep. No. 90-728 (1967) (*reprinted in* 1967 U.S.C.C.A.N. 1956) (*citing* S. Rep. No. 89-192, at 6) (emphasis added); *see also* S. Rep. No. 90-403, at 33 (FCAA preemption protects the "general consumer" from the California standards).[7] Thus, in 1967, FCAA § 209(a) protected not only manufacturers, but also consumers, users, and dealers under the scope of its preemption.

The decisions below emphasize that FCAA recognizes that air pollution is primarily a state and local

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[7] The conference committee adopted the House bill, H. Conf. Rep. No. 90-916 (*reprinted in* 1967 U.S.C.C.A.N. 1986), which had adopted the Senate bill's preemption provisions *verbatim*. *Compare* Pub. L. No. 90-148, § 208, 81 Stat. at 501 (§ 208 of enacted bill) *with* S. Rep. 403 at 81 (§ 208 of Senate Bill); *see also MEMA*, 627 F.2d at 1121 (discussing history).



responsibility. *See SCAQMD*, 158 F. Supp. 2d at 1111 (*citing* 42 U.S.C. § 7401(a)(3)). Indeed, Congress recognized state and local primacy in the Clean Air Act of 1963. Pub. L. No. 88-206, § 1(a)(3), 77 Stat. at 393 (*codified at* 42 U.S.C. § 7401(a)(3)). Against that backdrop, however, the Air Quality Act of 1967 specifically preempted state and local motor vehicle emission standards. Thus, the 1967 statute represents a clear departure from the 1963 statute. With reference to motor vehicle emissions standards, Congress determined that federal authority would supplant state authority, and the specific preemption from 1967 controls the general provision from 1963. *See Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) ("a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment"). Where (as here) the specific statute *postdates* the general one, the point carries even more force. *See, e.g., Morales*, 504 U.S. at 384-85 (the canon is "particularly pertinent" where a specific preemption provision post-dates a general provision that is a "relic of the . . . no pre-emption regime").

The decisions below also invoke the *Santa Fe Elevator* presumption against preemption, which is equally misplaced. First, as just set forth, the statute's plain language and its legislative history both express a clear and manifest intent to preempt, thus rendering the *Santa Fe Elevator* presumption inapposite. Second, and just as important, however, the *Santa Fe Elevator* presumption applies only where "the field which Congress is said to have pre-empted has been traditionally occupied by the States." *Locke*, 529 U.S. at 107-08 (*quoting Rath Packing Co.*, 430 U.S. at 525). Here, the federal government entered the field (*i.e.*, motor vehicle emission standards) contemporaneously with California and more than 30 years before SCAQMD. *See*

*MEMA*, 627 F.2d at 1108-09 (discussing history of vehicular emission controls). Thus, even without Congress' clear and manifest intent to preempt state and local motor vehicle standards, the *Santa Fe Elevator* presumption would remain inapposite by its terms. *See Locke*, 529 U.S. at 107-08 (*citing Santa Fe Elevator Corp.*, 331 U.S. at 230) (presumption applies where there is a history of state regulation and no corresponding federal presence); *accord Buckman*, 531 U.S. at 347. Put simply, *Santa Fe Elevator* protects longstanding state and local laws, not dormant state or local police power.

## II. SUBSEQUENT AMENDMENTS REINFORCE THE 1967 ACT'S UNAMBIGUOUS PREEMPTION

Since enacting the Air Quality Act of 1967, Congress enacted three major amendment to the Clean Air Act, in 1970, 1977, and 1990.[8] Nowhere in these amendments or their legislative histories did Congress evince the slightest intent to undo the protections that FCAA preemption provided to dealers, consumers, and users of motor vehicles or to authorize *local* imposition of standards on motor vehicles. To the contrary, all of the post-1967 amendments to FCAA's preemption provisions draw the same deliberate distinctions between broadly preempting *both state and local*

[8] Pub. L. No. 91-604, 84 Stat. 1676 (1970); Pub. L. No. 95-95, 91 Stat. 685 (1977); Pub. L. No. 101-549, 104 Stat. 2520 (1990).



*authority* and – when making *any* exceptions – making limited exceptions only for *states*.[9]

Absent Congress' affirmative showing of an intent to repeal the express preemption it created in 1967, the SCAQMD rules can survive only if the original FCAA preemption provisions are *"irreconcilable"* with the FCAA as amended. *Morton v. Mancari*, 417 U.S. at 550 (repeal by implication is disfavored). Far from irreconcilable, however, the post-1967 amendments fully reinforce the preemption that Congress clearly and manifestly enacted in 1967.

### A. Clean Air Act of 1970

In the 1970 amendments, Congress enacted two provisions relevant to the preemption of motor vehicle standards: (1) the FCAA's savings clause, FCAA § 116, and (2) FCAA § 233, which preempts state and local emission standards for aircraft and aircraft engines. Pub. L. No. 91-604, §§ 116, 233, 84 Stat. at. 1689, 1704 (*codified at* 42 U.S.C. §§ 7416, 7573). Consistent with the distinction between state and local authority in the 1967 act, both

[9] *See, e.g.*, 42 U.S.C. § 7543(c) (preempting state and local authority to regulate FCAA-regulated parts during a vehicle's useful life, but preserving California's authority to do so); 42 U.S.C. § 7543(e) (preempting state and local authority over nonroad vehicle standards, but preserving the State of California's authority to set such standards and authorizing other states to adopt the California standards); 42 U.S.C. § 7416 (preserving state and local authority generally, but not to standards preempted by FCAA § 209); 42 U.S.C. § 7573 (preempting state and local authority to set aircraft emission standards); 42 U.S.C. § 7586 (authorizing states to seek EPA approval of state fleet rules).

provisions also expressly distinguish between states and political subdivisions. *See* 42 U.S.C. §§ 7416, 7573.[10]

### B. Clean Air Act Amendments of 1977

In the 1977 amendments, Congress enacted two provisions relevant to the preemption of motor vehicle standards: (1) the FCAA § 177 opt-in clause for other nonattainment states to adopt California standards, and (2) the "parts preemption" provision of FCAA § 209(c), which preempts state and local governments from imposing requirements on FCAA-regulated parts for "in-use" motor vehicles during their "useful life." Pub. L. No. 95-95, §§ 129(b), 207, 91 Stat. at 750, 755, 762 (*codified at* 42 U.S.C. §§ 7507, 7543(c)).

#### 1. Section 177 and the "Undue Burden" Test

FCAA § 177 authorizes states with areas not attaining the national ambient air quality standards to adopt California vehicle standards in lieu of the otherwise-applicable federal standards. 42 U.S.C. § 7507. Because this provision applies

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[10] The district court deferred to a summary of congressional intent for aircraft preemption in *People of State of Cal. ex rel. State Air Resources Board v. Dep't of Navy*, 431 F. Supp. 1271, 1285 (N.D. Cal. 1977) (*Navy I*), *aff'd*, 885 (9th Cir. 1980) (*Navy II*). The *Navy* cases concern a later-enacted section (42 U.S.C. § 7573) applicable to a different type of vehicle (aircraft), where the later enactment has only limited legislative history, *Navy II*, 624 F.2d at 888 n.4, and preserves the earlier statute's clear distinction between state and local authority. Accordingly, *amici* contend that the *Navy* cases and the 1970 aircraft preemption amendment cannot repeal by implication the motor-vehicle preemption that Congress clearly and manifestly adopted in 1967.



to states, but not political subdivisions, it, too, preserves the clear distinction between the authority afforded to California, the other states, and all political subdivisions.

Notwithstanding the provision's facially clear meaning, its legislative history has led some courts to limit the scope of FCAA preemption to only those standards that cause an "undue burden" on manufacturers. *SCAQMD*, 158 F. Supp. 2d at 1110 (*citing Motor Vehicle Mfrs. Ass'n v. New York State Dep't of Envtl. Conservation*, 810 F. Supp. 1331 (N.D.N.Y. 1993)). But that legislative history cannot bear the weight placed on it by these courts. Instead, the cited House report simply states that FCAA § 177's new authority for other states to adopt California's standards "should not place an undue burden on vehicle manufacturers." *See* H.R. Rep. No. 95-294, at 310-11 (1977) (*reprinted in* 1977 U.S.C.C.A.N., 1388-89). In adopting the holding of *Motor Vehicle Mfrs. Ass'n*, the district court implicitly interpreted "should" to mean "shall" and, therefore, concluded that the House report narrowed the preemptive scope of FCAA § 209(a) to only those standards that impose an "undue burden" on manufacturers.

To the contrary, however, the House report merely opines that states opting into the California standards "should not" (*i.e.*, likely will not) unduly burden manufacturers because manufacturers already must design and produce the same vehicles for sale in California. A single vague word in the House report on FCAA § 177 in 1977 cannot repeal the preemption that FCAA § 209(a) and its legislative history already expressly provided to motor vehicle dealers,

consumers, and users in 1967. *Morton v. Mancari*, 417 U.S. at 550.[11]

### 2. Section 209(c) Retains the Clear Distinction between State and Local Standards for Parts Preemption

Subsection 209(c) preempts states other than California and all political subdivisions from regulating any FCAA-regulated vehicle part for the part's "useful life." 42 U.S.C. § 7543(c). As such, this amendment retains the earlier statutes' clear distinctions between California, other states, and all political subdivisions, thereby further reinforcing that Congress did not narrow the scope of the preemption it adopted in 1967.[12]

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[11] Given that 1977 House report's single vague word (namely, "should") can be read in harmony with the express statutory text and express legislative history of the 1967 act, it certainly does not rise to the level that this Court previously has found to warrant repeal by implication. *See, e.g., United States v. Fausto*, 484 U.S. 439, 452-53 (1988) (allowing "repeal by implication of a legal disposition *implied* by a statutory text") (emphasis added); *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 786 & n.17 (2000) (allowing repeal by implication to avoid a "most peculiar" result); *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (allowing subsequent and *more specific statute* to govern where necessary for harmony and to avoid violating rules of common sense).

[12] The district court cites *Allway Taxi* for the proposition that local governments retain authority to regulate motor vehicle emissions, provided they do not burden interstate commerce. *SCAQMD*, 158 F. Supp. 2d at 1110 (*citing Allway Taxi v. City of New York*, 340 F. Supp. 1120 (S.D.N.Y.), *aff'd*, 468 F.2d 624 (2nd Cir.1972)). *Allway Taxi* held that – because the Clean Air Act preempts standards only for *new* motor

*(Footnote cont'd on next page)*



## C. Clean Air Act Amendments of 1990

In the 1990 amendments, Congress enacted three provisions relevant to the preemption of motor vehicle standards: (1) language clarifying FCAA § 177, (2) preemption provisions for nonroad vehicles, and (3) the Clean Fuel Fleet Program ("CFFP"). Pub. L. No. 101-549, §§ 229(a), 232, 104 Stat. at 2511-2529.

### 1. Clarifying Section 177 and the "Undue Burden" Test Revisited

The Conference Committee added explanatory language to the end of FCAA § 177:

> Nothing in this section or in subchapter II of this chapter shall be construed as authorizing any such State to prohibit or limit, directly or indirectly, the manufacture or sale of a new motor vehicle or motor vehicle engine that is certified in California as meeting California standards, or to take any action of any kind to create, or have the effect of creating, a motor

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*(Footnote cont'd from previous page.)*

vehicles – local government could regulate vehicles *after their initial purchase*. 340 F.Supp. at 1124; *accord Washington v. General Motors Corp.*, 406 U.S. 109, 115 n.4 (1972) (*dicta*). The district court failed to recognize that the 1977 "parts preemption" amendment abrogates the 1972 holding in *Allway Taxi* and *eliminates* the residual authority of states (other than California) and of all political subdivisions to impose post-purchase emission controls on vehicles during their federally regulated useful life. *See* 42 U.S.C. § 7543(c).

> vehicle or motor vehicle engine different than a motor vehicle or engine certified in California under California standards (a "third vehicle") or otherwise create such a "third vehicle".

Pub. L. No. 101-549, § 232, 104 Stat. at 2529 (*codified at* 42 U.S.C. § 7507).

In reviewing this addition, the district court focused exclusively on the "third vehicle" phrase and ignored the balance of the amendment. *See SCAQMD,* 158 F. Supp. 2d at 1119-20. Specifically, the district court ignored that the language prohibiting states from limiting (directly or indirectly) the *manufacture* of California-certified vehicles applies equally to the *sale* of such vehicles. 42 U.S.C. § 7507. Moreover, in the text quoted above, an "or" separates the prohibition on indirect limitations on sales from the prohibition on third vehicles. *Id.* As such, the two are distinct proscriptions against distinct types of state actions, and the district court erred in reducing them to a single "third vehicle" standard. Clearly, prohibiting the purchase of a vehicle *"indirectly limits"* the sale of that vehicle.

At the center of its analysis of FCAA § 177, the district court relies on legislative history, which it attributes to the Senate Committee on Public Works, equating the "third vehicle" provision to the "undue burden" test. *SCAQMD,* 158 F. Supp. 2d at 1120 (*quoting* Senate Comm. on Pub. Works, 103d Cong., 1st Sess., A Legislative History of the Clean Air Act Amendments of 1990, Serial No. 103-38, Vol. 1 at 1022); *see also id.* at 1110 (*citing Motor Vehicle Mfrs. Ass'n v. New York State Dep't of Envtl. Conservation,* 810 F. Supp. 1331, 1337 (N.D.N.Y. 1993)).



In fact, however, that Committee merely served as the *publisher* of the bound legislative history for the 1990 amendments, and a single senator provided the district court's "legislative history" in a floor statement. 136 Cong. Rec. S16,969, S16,976 (daily ed. Oct. 27, 1990) (*reprinted in* Senate Comm. on Pub. Works, 103d Cong., 1st Sess., A Legislative History of the Clean Air Act Amendments of 1990, Serial No. 103-38, Vol. 1, at 1000, 1021-23) (statement of Sen. Baucus). In his personal statement, Senator Baucus makes the same flawed reading of the 1977 House Report that *amici* discuss in Section II.B.1, *supra.*

Surprisingly, in an earlier Ninth Circuit ruling not brought to the district court's attention, substantially the same parties as respondents litigated *Coalition for Clean Air v. Southern Cal. Edison Co.,* 971 F.2d 219 (9th Cir. 1992), *cert. denied sub nom., EPA v. Coalition for Clean Air,* 507 U.S. 950 (1993), which found the very same floor statement entitled to "little if any weight." 971 F.2d at 227-28. Even if respondents had no obligation to advise the district court of the Ninth Circuit's ruling in their prior litigation and even if that prior ruling does not preclude respondents' reliance on the previously disregarded floor statement,[13] the statement of a single senator does not provide authoritative legislative history. *E.g., Chrysler Corp. v. Brown,* 441 U.S. 281, 311

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[13] The Ninth Circuit's 1992 decision bound SCAQMD, the Sierra Club, and the Coalition for Clean Air. *See* 971 F.2d 219. Even though respondents now include three additional parties (Communities for a Better Environment, the Natural Resources Defense Council, and the Planning & Conservation League), the 1992 litigation binds them too because they intervened as defendants to support SCAQMD's rules. *See City of Tacoma v. Taxpayers of Tacoma,* 357 U.S. 320, 340-341 (1958).

(1979); *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980).

### 2. Section 209(e) Retains the Clear Distinction between State and Local Standards for Nonroad Preemption

In 1990 for the first time, Congress added authority for vehicular emission standards for nonroad equipment such as construction equipment, locomotives, and farming equipment, and preempted "any standard or other requirement relating to the control of emissions" from nonroad equipment. 42 U.S.C. §§ 7543(e), 7547. In doing so, Congress again provided California with authority to seek a waiver of preemption for certain controls, authorized other states to adopt those California controls, and completely preempted local controls. 42 U.S.C. § 7543(e).

Significantly, the Environmental Protection Agency has promulgated a regulation that identifies state and local "fleet average standards" as prohibited "standards and other requirements" under FCAA § 209(e). *See* 40 C.F.R. § 85.1603(c)(2). As respondents noted in their opposition to this Court's granting a writ of *certiorari*, however, FCAA § 209(e) broadly preempts "any standard *or other requirement*" relating to emission controls. Assuming (as the phrase suggests) that the EPA-proscribed "fleet average *standards*" are *standards,* and not *other requirements,* under FCAA § 209(e), they presumptively also are standards under FCAA § 209(a). *See, e.g., Department of Revenue of Oregon v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994) (same words in same statute presumptively share the same meaning).



### 3. Section 246 Does Not Recognize Residual State Authority to Regulate Fleets

In the 1990 amendments, Congress established the CFFP to require states with ozone nonattainment areas designated as serious or worse to require certain fleet operators to operate a carefully balanced clean-fuel fleet program . 42 U.S.C. §§ 7511a(c)(4), 7586. In the district court's view, the CFFP expressly recognizes states' authority to regulate fleets, which California has delegated to SCAQMD via the California Health & Safety Code. *See SCAQMD,* 158 F. Supp. 2d at 1118. The district court considered it "not rational" to read the FCAA to authorize fleet purchase restrictions under the CFFP, while expressly preempting them as standards under FCAA § 209(a). In *amici*'s view, the district court failed to consider an alternate reading, which puts the CFFP in harmony with the express preemption of FCAA § 209(a). Even if this Court agrees with the district court, however, FCAA § 246 nevertheless impliedly would preempt the SCAQMD Fleet Rules under a conflict-preemption analysis.

By its terms, FCAA § 209(a) preempts states and political subdivisions from adopting or enforcing standards relating to the control of emissions subject to "this part," 42 U.S.C. § 7543(a), with "this part" meaning Part A of Title II of the Clean Air Act. Part A consists of sections 202-219, 42 U.S.C. §§ 7521-7554, whereas the CFFP resides in Part C of Title II, which consists of sections 241-250, 42 U.S.C. §§ 7581-7590. Thus, when adopting fleet regulations pursuant to the CFFP, a state does not violate FCAA § 209(a), which does not apply by its terms to standards under Part C. On the other hand, a state adopting fleet regulations *outside the CFFP* necessarily could not rely on

the CFFP to justify those fleet regulations, which would fall under the express preemption of FCAA § 209(a). Further, to the extent that they conflict with CFFP, the state regulations also would be preempted under this Court's conflict-preemption jurisprudence. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 873 (2000) (neither savings clause nor express preemption provision bars working of "conflict preemption"); *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 352 (2001) (same).

Because California has opted out of the CFFP,[14] it cannot submit the SCAQMD fleet rules to EPA for approval under the CFFP. Even if California could submit them, however, the SCAQMD rules conflict irreconcilably with at least five fundamental aspects of the carefully balanced CFFP. *First*, the CFFP caps the maximum percentage of heavy-duty (50%) and light-duty (70%) trucks that a state can require a fleet operator to purchase. 42 U.S.C. § 7586(b). SCAQMD requires such operators to purchase *only* clean-fuel vehicles (*i.e.*, 100%). *Second*, the CFFP defines a "clean-fuel vehicle" as a vehicle meeting the *least stringent* California standard applicable to that class of vehicle, 42 U.S.C. § 7583(e)(2), and requires states to provide credits to fleet operators that purchase a higher number of clean-fuel vehicles than the CFFP requires or that purchase vehicles that meet emission standards more stringent than the CFFP requires. 42 U.S.C. § 7586(f)(1), (f)(4); *accord* 40 C.F.R. § 88.304—94(c)(1)(ii)-(iii) (2002).

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[14] *See* 42 U.S.C. § 7511a(c)(4)(B) (authorizing states to opt out of CFFP); 64 Fed. Reg. 46,849 (Aug. 27, 1999) (*codified at* 40 C.F.R. § 52.220(c)(201)(i)(A)(1) (2002)) (EPA approval of California opt out).



The SCAQMD rules fail to do so. *Third*, although state and local governments must not directly or *indirectly* limit the sale of clean-fuel vehicles, 42 U.S.C. § 7507,[15] the SCAQMD rules prohibit fleet operators from purchasing such vehicles. *Fourth*, the fuel-neutral CFFP defines "clean alternative fuel" to include both reformulated gasoline and diesel, 42 U.S.C. § 7581(2), and leaves the choice of fuel to the fleet operator, 42 U.S.C. § 7586(d), but the SCAQMD rules severely restrict diesel-fueled vehicles. *Fifth*, states must waive state and local time-of-day and day-of-week restrictions for clean-fuel vehicles, 42 U.SC. § 7586(h), which the SCAQMD rules do not.

For the foregoing reasons, even if not standards, the SCAQMD Fleet Rules conflict with the CFFP, which therefore preempts those rules under a conflict-preemption analysis. *Geier*, 529 U.S. at 873; *Buckman Co.*, 531 U.S. at 352. Any other reading would frustrate Congress' purpose in the intricately balanced CFFP by allowing states to opt out of the CFFP under 42 U.S.C. § 7511a(c)(4)(B) and then to

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[15] Unlike FCAA § 209(a), which applies only to new motor vehicles subject to *Part A* of Subchapter II, FCAA § 177 provides that "Nothing in this section or in *subchapter II* of this chapter shall be construed as authorizing any such State to prohibit or limit, directly or indirectly, the manufacture or sale of a new motor vehicle or motor vehicle engine that is certified in California as meeting California standards." 42 U.S.C. § 7507 (emphasis added). Thus, FCAA § 177 applies not only to Part A, but also to the CFFP in Part C. As such, the district court violated the express terms of FCAA § 177 by holding that the CFFP implicitly recognizes SCAQMD's authority to adopt purchase restrictions, *SCQAMD*, 158 F.Supp 2d at 1118, when FCAA § 177 actually prohibits any indirect restrictions on sales, 42 U.S.C. § 7507.

submit a replacement measure that robs fleet operators of the benefits that Congress required the states to provide.

## CONCLUSION

In 1967, Congress clearly and manifestly preempted political subdivisions such as SCAQMD from imposing vehicle emission standards on manufacturers, consumers, and dealers. Consistent with every amendment, Congress preserved that preemption by expressly distinguishing between the standard-setting authority for California, the adoption of those California standards by other states, and the complete preemption of local entities such as SCAQMD. For the foregoing reasons, therefore, *amici curiae* respectfully submit that FCAA § 209(a) preempts the SCAQMD Fleet Rules.

August 29, 2003

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Supreme Court, U.S.
FILED
AUG 29 2003
OFFICE OF THE CLERK

No. 02-1343

IN THE

# Supreme Court of the United States

ENGINE MANUFACTURERS ASSOCIATION AND
WESTERN STATES PETROLEUM ASSOCIATION,
*Petitioners*,

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, *et al.*,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

## STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America is the world's largest business federation.[1] It represents an underlying membership of more than three million

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae and its members, made a monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6. The brief is filed with the consent of the parties, and copies of the consent letters have been filed with the Clerk.

businesses and organizations of every size, in every industrial sector, and from every region of the country. The Chamber has participated as amicus curiae in several hundred cases before this Court, including numerous cases addressing the subject of federal preemption. *See, e.g.*, *Sprietsma* v. *Mercury Marine*, 537 U.S. 51 (2002); *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000); *United States* v. *Locke*, 529 U.S. 89 (2000); *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219 (1995).

## SUMMARY OF ARGUMENT

SCAQMD's Fleet Rules are preempted by the Clean Air Act. The federal Act prohibits States and their political subdivisions from adopting standards relating to the control of emissions from new motor vehicles. That is exactly what the Fleet Rules do: they require fleet operators operating within the District to purchase or lease new vehicles that comply with specific low-emissions requirements set by SCAQMD. The Rules therefore violate the Clean Air Act's express preemption provision. And by introducing new, unapproved, local emissions requirements into a largely uniform federal regulatory scheme, the Rules also conflict with the paramount legislative concern behind the Clean Air Act: sparing vehicle manufacturers, retailers, and consumers from the burdens of outfitting (and paying more for) vehicles that must comply with a patchwork of variously demanding emissions requirements. The Fleet Rules are therefore not only expressly preempted by the Act; they are conflict-preempted. And—to complete the preemption trifecta—the Rules also intrude on an entire field that Congress has reserved to federal regulation: the creation of emissions standards governing new motor vehicles.

For all these reasons, the Fleet Rules are preempted.



## ARGUMENT

### THE FLEET RULES ARE PREEMPTED BY THE CLEAN AIR ACT.

"A fundamental principle of the Constitution is that Congress has the power to preempt state law." *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 372 (2000). Congress exercised that constitutional power when it enacted the Clean Air Act: it made vehicle emissions a uniquely federal concern, and at the same time prohibited the States and "any political subdivision * * * [from] adopt[ing] or attempt[ing] to enforce any standard relating to the control of emissions from new motor vehicles." 42 U.S.C. § 7543(a). The preference for national emissions standards underscores precisely why the Constitution vests the power of preemption in Congress: were "each State to have a variation in standards and requirements[, it] could result in chaos insofar as manufacturers, dealers, and users are concerned." S. Rep. 89-192, at 6 (1965).

The Fleet Rules at issue in this case fall squarely within the broad preemptive scope of Clean Air Act. That is so whether the Rules are analyzed under any of the three preemption doctrines—express, conflict, or field—since none is "rigidly distinct" from the others. *Crosby*, 530 U.S. at 372 n.6 (quoting *English* v. *General Elec. Co.*, 496 U.S. 72, 79 n.5 (1990)). After all, the "ultimate touchstone" in preemption analysis is not selecting a proper label, but divining congressional intent. *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 208 (1985). Whatever the label assigned, the text, structure, and purpose of the Clean Air Act unmistakably show that the Fleet Rules are precisely the sort of parochial regulation that Congress intended to supersede. *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 138 (1990); *FMC Corp.* v. *Holliday*, 498 U.S. 52, 56-57 (1990). The judgment of the Ninth Circuit upholding the Rules should be reversed.

### A. Section 209 Of The Clean Air Act Expressly Preempts Any Regulation Relating To The Control Of Emissions From New Motor Vehicles.

When Congress has made its preemptive intent known through explicit statutory language, this Court's task is "an easy one." *English*, 496 U.S. at 79; *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993). This is an easy case. Congress's intent to preempt state and local regulation relating to the control of motor-vehicle emissions is plain on the face of the Clean Air Act's express preemption provision, and is further confirmed by the structure and legislative history of that statute.

#### 1. The Text Of Section 209 Plainly Applies To The Fleet Rules.

Section 209(a) of the Clean Air Act expressly provides:

> No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles * * *. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle * * * as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle * * *. [42 U.S.C. § 7543(a).]

Each federal court of appeals to have addressed Section 209—until the Ninth Circuit below—has recognized that Congress's intent to preempt local emissions standards is both express and expansive. *See, e.g., American Auto. Mfrs. Ass'n* v. *Cahill*, 152 F.3d 196, 200 (2d Cir. 1998) (preemption under Section 209(a) occurs when a state or locality institutes "standards relating to the control of emissions," construed as "regulatory measures intended to lower the level of auto emissions"); *Association of Int'l Auto. Mfrs., Inc.* v. *Commissioner*, 208 F.3d 1, 6 (1st Cir. 2000). In *Cahill*, for example, the Second Circuit addressed a New York regulation requiring automobile manufacturers to sell a certain percentage of zero-emission vehicles ("ZEVs") per year. As with the Fleet Rules here, the *Cahill* court recognized that the New York regulation "has no purpose other than to effect a general reduction in emissions [and is] in the nature of a command having a direct effect on the level of emissions." 152 F.3d at 200. The Second Circuit therefore ruled that the ZEV sales requirement "must be considered a standard 'relating to the control of emissions,' " and thus was preempted by Section 209(a). *Id.*



By the same token, the First Circuit in *Commissioner*, 208 F.3d at 6, found a similar ZEV sales requirement in Massachusetts to be an impermissible "standard[] relating to the control of emissions." Following the lead of the Second Circuit, the court emphasized that Section 209(a) preemption depends on the *goal* of the local regulation. Where "the *very purpose and effect* of the ZEV mandates is to effect a quantitative reduction in emissions," the State regulation is necessarily preempted. 208 F.3d at 7 (citations omitted and emphasis added). *See also Motor & Equipment Mfrs. Ass'n* v. *EPA*, 627 F.2d 1095, 1106 (D.C. Cir. 1979) (construing "standards relating to the control of emissions" to include efforts by a state to reduce emissions by encouraging production of more durable emissions-related parts), *cert. denied*, 446 U.S. 1456 (1980).

The Ninth Circuit's approach to Section 209(a) runs directly counter to these decisions. Respondent SCAQMD, in its opposition to certiorari, candidly makes no pretense about the "very purpose and effect" of its Fleet Rules: to augment the ranks of public and private vehicle fleets in the South Coast District with exclusively low-emission new vehicles and thereby "reduce harmful emissions from certain motor vehicle fleets." Opp. 1. *See also* Pet. App. 15a (District Court recognizing that Fleet Rules are "an effort to reduce public exposure to motor vehicle pollution"). In particular, the Rules mandate that fleet operators—a group that controls

a high volume of pollution-emitting vehicles within the District—purchase or lease new vehicles that satisfy specific low-emissions standards. As in *Cahill*, the Fleet Rules have, in fact, "no purpose other than to effect a general reduction in emissions." *Cahill*, 152 F.3d at 200; *accord Commissioner*, 208 F.3d at 7. Accordingly, by their very design, the Fleet Rules—unmistakably "regulatory measures intended to lower the level of auto emissions" in the South Coast Air Quality District, *see Cahill*, 152 F.3d at 200—are "standards relating to the control of emissions from new motor vehicles." For that reason alone, preemption is warranted.[2]

The District Court below, in an opinion that the Ninth Circuit adopted wholesale, conveniently brushed all this aside by focusing *not* on the express language of Section 209(a) but instead on what it regarded as "Congress's purpose behind motor vehicle preemption." Pet App. 21a. This highly generalized characterization—tethered neither to the Act's text nor to its structure—led the court to conclude that the Fleet Rules were not preempted because they did not "run afoul of * * * the protection of manufacturers against having to build engines in compliance with a multiplicity of standards." *Id.* Not only did the court err in elevating buried

[2] There are still other ways in which the Fleet Rules violate Section 209(a). In certain situations, the Rules require fleet operators to obtain approval certificates from the District before purchasing new vehicles. *See, e.g.*, Fleet Rule 1186.1(d)(1)(B), (e) (requiring public and private sweeper fleet operators unable to purchase or lease alternative-fuel sweepers to obtain Technical Infeasibility Certifications prior to purchasing or leasing new sweepers); Fleet Rule 1196(d)(4), (e) (same rule for heavy-duty public fleet vehicles). The Rules therefore improperly impose "certification" requirements "relating to the control of emissions from any new motor vehicle * * * as condition precedent to the initial retail sale * * * of such motor vehicle"—a category of regulation expressly preempted by the second sentence of Section 209(a).



"purpose" over plain text,[3] but its selective view of the Clean Air Act's purpose was wrong as well.

Based on its own view of the purpose behind Section 209 preemption, the District Court drew a distinction between State vehicle-emissions standards that apply to the *sale* of new vehicles and those that apply to *purchases*. *Id.* at 21a-22a. The statute, however, draws no such distinction—"*any* standards relating to the control of emissions," whether they target the sale *or* purchase of motor vehicles, are preempted. 42 U.S.C. § 7543(a) (emphasis added). But in any event, even if the District Court were right (it was not) that Section 209's driving purpose was to protect manufacturers "against having to build engines in compliance with a multiplicity of standards," Pet. App. 21a, and even if the District Court were right (it was not) to focus on that purpose to the exclusion of the text, the fact remains that placing emissions restrictions on the *purchase* of vehicles necessarily affects the *sale* of those vehicles. To draw a line between emissions sales (preempted) and purchases (not preempted) is, as far as Section 209 is concerned, truly a distinction without any difference.

Indeed, other courts have squarely recognized that Section 209(a) preempts state regulations that impose requirements on both the consumers who purchase vehicles and the manufacturers that sell them. In *Sims* v. *Florida, Dep't of Highway Safety & Motor Vehicles*, 862 F.2d 1449, 1454-55

[3] *See Gade* v. *National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992) ("A freewheeling judicial inquiry into whether a state statute is in tension with federal objectives would undercut the principle that it is Congress rather than the courts that pre-empts state law.") (Kennedy, J., concurring in part and concurring in judgment); *FMC Corp.* v. *Holliday*, 498 U.S. at 57 (in determining preemption, "[w]e begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose") (quotations omitted).

(11th Cir. 1989) (en banc), *cert. denied*, 493 U.S. 815 (1980) for example, the Eleventh Circuit considered a state requirement that owners of "gray-market" automobiles—those not intended to be imported into the United States, and thus not necessarily in compliance with domestic emissions standards—demonstrate EPA certification before titling, registering, or selling the vehicles. The court held that this requirement, which it described as "[e]nforcement of the Clean Air Act before [the] first sale [of new motor vehicles]," was preempted by Section 209(a). *Id.* at 1455. Two other courts have considered nearly identical regulations and have decided the question the same way. *See Direct Auto. Imports Ass'n* v. *Townsley*, 804 F.2d 1408, 1411 (5th Cir. 1986); *Georgia Auto. Importers Compliance Ass'n* v. *Bowers*, 639 F. Supp. 352, 356-357 (N.D. Ga. 1986).[4]

Furthermore, fleet composition regulations imposed on *purchasers* of nonroad vehicles, akin to the SCAQMD Fleet Rules here regulating motor vehicles, have already been viewed as preempted under Section 209(e) of the Act, which preempts "any standard or other requirement relating to the control of emissions" of nonroad vehicles. *See Engine Mfrs. Ass'n* v. *Huston*, 190 F. Supp. 2d 922 (W.D. Tex. 2001), *vacated as moot*, No. 01-50819 (5th Cir. Mar. 5, 2002). In *Huston*, the State of Texas adopted a regulation requiring individuals operating construction machinery in the Dallas-Fort Worth area "to have fleets with certain percentages of machines of the most modern low-emission design as pre-

[4] These courts relied on the second sentence of Section 209(a), which prohibits states from requiring "certification, inspection or any other approval relating to the control of emissions from any new motor vehicle * * * as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle * * *." 42 U.S.C. § 7543(a). As noted above, *supra* n.2, this prohibition equally applies here, in instances where the Fleet Rules require fleet operators to obtain approval certificates from the District as a condition precedent to the purchase or lease of new vehicles.



scribed by the federal standard." 190 F. Supp. 2d at 928. Relying on EPA's express preemption of "fleet average standards" for nonroad vehicles in 40 C.F.R. § 85.1603(c)(2), as well as on *Cahill* and *Commissioner*, the district court found that the state rule imposed emission standards. It thus held that the fleet composition requirement was preempted by Section 209(e) of the Clean Air Act—which, although worded slightly differently than Section 209(a), does *not* contain any language suggesting that state law regulating purchasers would be preempted under 209(e), but not 209(a).[5]

The District Court below also attempted to distinguish *Cahill* and *Commissioner* by reading the statutory phrase "standards relating to the control of emissions" as requiring "numerical control[s] on new vehicles." Pet. App. 21a. Yet once again, the statute in no way limits emissions standards to *quantitative* limits on emissions from new vehicles; certainly no court—until now—had ever adopted such a cramped interpretation. The Second Circuit in *Cahill* found that New York's ZEV sales requirement "d[id] not impose precise overall quantitative limits on levels of emissions," but nonetheless found preemption because the regulation had "no purpose other than to effect a general reduction in emissions." 152 F.3d at 200.[6] And the court in *Huston* flatly

[5] Section 209(e) notably does not appear to incorporate the savings clause for motor vehicles, 42 U.S.C. § 7543(d)—which allows states to regulate the use, operation, or movement of motor vehicles (otherwise known as "in-use controls")—into the nonroad vehicle provision. Significantly, however, the *Huston* court dismissed Texas's "attempt to portray [the Fleet Composition Requirement] as merely an in-use control," finding it to be "*clearly* an attempt by the state to control the emissions of nonroad vehicles through a 'standard or other requirement.' " 190 F. Supp. 2d at 929 (emphasis added).

[6] Likewise, in *Sims*, *Townsley*, and *Bowers*, the states had not imposed any new emissions requirements on manufacturers; on the

rejected the same argument, finding preemption despite the state's contention that its fleet composition rule "place[d] no technology-forcing sales restriction or sales quotas on nonroad equipment manufacturers." 190 F. Supp. 2d at 928. Thus all other courts to have considered the issue have not focused on the presence or absence of strict numerical emissions limits, but rather on the impact the state law has on aggregate emissions levels. Because SCAQMD's Fleet Rules were expressly "enacted to reduce harmful emissions from certain motor vehicle fleets," Opp. 1, they are pre-empted by Section 209(a), regardless of how they do it.

### 2. The Fleet Rules Are Regulations "Relating To" The Control Of Emissions.

Because Section 209 expressly prohibits political subdivisions like SCAQMD from "adopt[ing] * * * any standard relating to the control of emissions," the question in this case is not whether Congress intended to preempt State emissions regulations—it clearly did—but how far Congress intended to go. To resolve that inquiry, "the key phrase, obviously, is 'relating to.' " *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992). For the broader the interpretation, the less directly the Fleet Rules need regulate emissions to be preempted.

Here, the Court's interpretive task is straightforward. In a long line of preemption cases focusing on statutes that employ identical or virtually identical language, this Court has consistently recognized that the words "relating to" "express a broad pre-emptive purpose." *Id.* at 383. Thus, in surveying the preemptive scope of the Airline Deregulation Act at issue in *Morales*—which expressly preempted state

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contrary, they expressly enforced already-existing Clean Air Act standards. And in *Motor & Equipment Manufacturers*, 627 F.2d at 1103, the state was simply regulating the instructions manufacturers could give to purchasers—hardly a new emissions requirement, much less a *quantitative* emissions requirement.



laws or standards "relating to" airline rates—this Court started from the premise that "[t]he ordinary meaning of these words ["relating to"] is a broad one—'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.' " *Id.* at 383 (quoting Black's Law Dictionary 1158 (5th ed. 1979)). From there, the Court easily concluded that this "deliberately expansive" clause should have a broad preemptive "sweep." *Id.* at 384.

*Morales*'s take on the words "relating to" was not unprecedented or peculiar to the ADA. In at least a dozen cases over the past 20 years, this Court has addressed preemption under the Employee Retirement Income Security Act, another comprehensive federal statute that—echoing Section 209's preemption clause—expressly supersedes state laws "relate[d] to" ERISA plans. 29 U.S.C. § 1144(a). In applying this clause to a variety of different contexts, this Court has "observed repeatedly that this broadly worded" phrase—"related to"—is "clearly expansive." *Egelhoff* v. *Egelhoff ex rel. Breiner*, 532 U.S. 141, 146 (2001). Indeed, as with the ADA's preemption clause at issue in *Morales*, this Court has acknowledged that the "breadth of [ERISA's] pre-emptive reach is apparent from [its] language," *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96 (1983), demonstrating Congress's intent to create a preemption clause of "broad scope," *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 739 (1985), and "expansive sweep." *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 47 (1987).

Of course, while "conspicuous for their breadth," *FMC Corp.*, 498 U.S. at 58, "relates to" clauses obviously do not "extend to the furthest stretch of * * * indeterminacy," preempting laws with " 'only a tenuous, remote, or peripheral connection' " to the statute's purpose. *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 655, 661 (1995) (citation omitted). To give effect to Congress's "deliberately expansive" pre-

emptive command, *Pilot Life*, 481 U.S. at 46, while at the same time insulating peripheral state laws from unnecessary federal preemption, this Court has identified two types of laws that are subject to preemption for impermissibly "relating to" an area of exclusive federal concern: first, laws that specifically "refer to" the federal interest and, second, those that otherwise have a "connection with" the federal interest. *See, e.g.*, *Shaw*, 463 U.S. at 97 (state law "relate[s] to" an ERISA plan and is therefore preempted "if it has a connection with, or reference to, such a plan"); *California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 324-325 (1997) (same); *Morales*, 504 U.S. at 384 (same). To adapt the language of *Morales* to this case, 504 U.S. at 384, because "the relevant language of the [Clean Air Act] is identical" to the preemptive clauses in the ADA and ERISA, it is therefore "appropriate [for this Court] to adopt the same standard here": regulations issued by political subdivisions that "refer to" or have a "connection with" emissions standards are preempted under Section 209(a).

Whatever the outer limits of 209's preemptive sweep, this Court need not plot its bounds here. *Cf. Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. at 220 ("The full scope of the preemptive effect * * * [can] remain[] to be fleshed out on a case-by-case basis."). That is because the Fleet Rules—as regulations that expressly refer to emissions standards and, in SCAQMD's own words, attempt to "reduce harmful emissions from certain motor vehicle fleets," Opp. 1—comfortably fit within the scope of core concerns for which Congress preserved exclusive federal control.

Indeed, the fact that the Fleet Rules expressly incorporate and refer to vehicle-emissions standards[7] is enough, by itself,

[7] *See, e.g.*, Pet. App. 16a & nn. 3-4 (Fleet Rule 1191 expressly requires certain fleet operators "to acquire low-emitting gasoline or



to justify preemption. As this Court has recognized in an analogous context, a "state statute's express reference to ERISA plans suffices to bring it within the federal law's preemptive reach." *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 830 (1988). Although this Court has since suggested that the federal interest to which the state statute makes express reference must also be "essential to the [state] law's operation," *Dillingham*, 519 U.S. at 325, that is surely the case here. After all, the Fleet Rules would be meaningless if they no longer referred to emissions standards, since their very purpose is to compel fleet operators to purchase vehicles that satisfy specific and strict emissions standards.

Yet regardless of whether the Fleet Rules' express invocation of vehicle-emissions standards is enough to warrant preemption, those repeated references demonstrate that the Rules' pervasive influence over emissions is no accident or coincidence. Thus, this case is nothing like those state regulations of general applicability that this Court has held immune to preemption because they had " 'only a tenuous, remote, or peripheral connection' " with an exclusive federal interest. *Travelers*, 514 U.S. at 661 (citation omitted).[8] Here, the Fleet Rules do not simply have some "indirect economic effect on choices made by" fleet operators and manufacturers. *Travelers*, 514 U.S. at 659. Rather, they are

alternative-fueled vehicles," both of which are established emissions standards).

[8] *See, e.g.*, *Travelers*, 514 U.S. at 659 (state law imposing surcharge on hospital patients insured by commercial insurers other than Blue Cross had only "an indirect economic effect on choices made by insurance buyers, including ERISA plans"); *De Buono* v. *NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 810-816 (1997) (state tax imposed on all hospitals, including those administered by ERISA plans, not preempted); *Dillingham*, 519 U.S. at 330 (state law requiring all contractors to pay prevailing wage applied generally and was not preempted).

quite purposefully intended to "dictate the choices" of both constituencies. *Dillingham*, 519 U.S. at 334. With respect to fleet operators, the Rules plainly leave them with no choice other than to purchase vehicles that comply with SCAQMD's chosen emissions standards. And while manufacturers are not directly targeted by the Rules, they will inevitably be forced to modify their production schedules to satisfy the artificial demand for low-emission vehicles created by the Fleet Rules.

Given that the Fleet Rules have absolutely *no other purpose* than "to reduce harmful emissions from certain motor vehicles," Opp. 1, the argument for preemption is even clearer. This Court's precedents have never required as a condition for preemption that a state law single-mindedly target an area of exclusive federal concern. *See Ingersoll-Rand*, 498 U.S. at 139 ("a state law may 'relate to' a benefit plan, and thereby be preempted, even if the law is not specifically designed to affect such plans, or the effect is only indirect"). Thus, so long as the effect on the federal interest was not too tenuous or remote, this Court has found preempted common-law tort and contract suits, *Pilot Life*, 481 U.S. at 47-48, a state law requiring health-insurance plans to cover certain mental-health expenses, *Metropolitan Life*, 471 U.S. at 739, and workers' compensation laws, *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525 (1981). The Fleet Rules, by contrast, are focused on one thing only: reducing emissions through stringent vehicle-emissions standards. That is an area Congress expressly left to federal control. *See* H.R. Rep. No. 89-899, at 5 (1965) ("The Committee is convinced that motor vehicle exhaust control standards on a national scale are necessary and would be of benefit of the entire country. * * * The high rate of mobility of automobiles suggests that anything short of nationwide control would scarcely be adequate to cope with the motor vehicle pollution problem.").



Whether the Fleet Rules "plainly further the federal Clean Air Act's core purpose—to reduce pollution," as SCAQMD has maintained (Opp. 1), is irrelevant to whether they impermissibly "relate to" emissions standards. As this Court has recognized when construing both the ADA and ERISA, those "pre-emption provision[s] * * * displace[] all state laws that fall within its sphere, *even including state laws that are consistent with* [the federal act's] substantive requirements." *Morales*, 504 U.S. at 387 (quoting *Mackey*, 486 U.S. at 829) (ellipses omitted and emphasis added). If anything, the fact that SCAQMD's Fleet Rules concededly touch upon "core" emissions-standards concerns illustrates why the Rules clearly fall within the preemptive sweep of Section 209.

It is also too facile an analysis to assume that anything a State—or political subdivision—does to reduce air pollution necessarily vindicates Congress's interests and should be permitted. As this Court has held:

> "[N]o legislation pursues its purposes at all costs. Deciding what competing value will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." [*Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 646-647 (1990) (emphasis in original) (citation omitted).]

The Clean Air Act is no different. Congress's overarching goal in enacting it was, of course, to reduce air pollution, but the legislature was also keenly aware that regulations must be fashioned pragmatically so as not to strangle industry and the economy. Section 209(a) represents Congress's view that, whatever incremental environmental value there would be in allowing States and their political subdivisions to promulgate their own emissions standards, the interests of consumers,

industry, and interstate commerce required a national solution.

Equally unilluminating are the usual bromides that Congress should not be presumed to preempt areas of traditional state concern. *See* Pet. App. 8a-9a, 24a. The presumption against preemption of areas of "traditional" state regulation is just that—a presumption. It is overborne where, as here, Congress clearly intended to displace state law: "[T]he relative importance to the State of its own law is not material when there is a conflict with valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Fidelity Federal Sav. & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Free* v. *Bland*, 369 U.S. 663, 666 (1962)). Thus this Court has recognized that the mere fact that "the States traditionally regulated these areas would not alone immunize their efforts." *Dillingham*, 519 U.S. at 330. ERISA, for example, "certainly contemplated the pre-emption of substantial areas of traditional state regulation." *Id.* And while States no doubt play a significant role in regulating air pollution—both before and after the Clean Air Act—Congress was careful to carve out vehicle-emissions standards as a particularly federal concern. As the House Report declared: "While the committee is cognizant of the basic rights and responsibilities of the States for control of air pollution, it is apparent that the establishment of Federal standards applicable to motor vehicle emissions is preferable to regulation by individual States." H.R. Rep. No. 89-899, at 5. Assumptions about traditional state roles cannot trump Congress's clear intent to preempt state law.

### 3. Section 209's Structure Likewise Supports The Conclusion That The Fleet Rules Are Preempted.

Not only does the text of Section 209 mandate express preemption of the Fleet Rules; its structure does as well. As noted, Section 209(a) prohibits any state or local "standards



relating to the control of emissions," including "certification, inspection, or any other approval * * * as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle." 42 U.S.C. § 7543(a). Under this provision, then, states and localities may not regulate motor vehicle emissions from the time of manufacture to the time of the initial sale and registration of the new motor vehicle.

Section 209(d), however, preserves the rights of the states and localities to regulate *post-purchase* activities, including "the use, operation, or movement," of motor vehicles in their jurisdiction. 42 U.S.C. § 7543(d). Through this bifurcated framework, the Clean Air Act evinces "Congress's intent to exclusively enforce federal emission standards relating to new automobiles before their initial sale because the statute specifically allows the states to regulate automobile use and operation *subsequent* to the initial sale." *Sims*, 862 F.2d at 1455 n.8 (quoting 42 U.S.C. § 7543(d)) (emphasis in original); *cf. Motor & Equipment Mfrs. Ass'n* v. *Nichols*, 142 F.3d 449, 452 (D.C. Cir. 1998) ("Subchapter I of the Act is primarily concerned with the ground rules for the implementation of these *post-purchase* programs by the states. Subchapter II of the Act vests in the federal government the almost exclusive responsibility for establishing automobile emissions standards for new cars.") (emphasis added).

Thus, once motor vehicles are no longer "new" for preemption purposes, states and localities are free to regulate post-purchase activities, such as the "in-use regulations" preserved for the states through Section 209(d), which the courts have interpreted to include carpool lanes, restrictions on car use in urban areas, and programs to limit excessive idling. *See Huston*, 190 F. Supp. 2d at 929 n.5; *cf. Engine Mfrs. Ass'n* v. *EPA*, 88 F.3d 1075, 1093 (D.C. Cir. 1996). Other post-purchase activities include motor vehicle inspection programs and transportation control programs designed to reduce vehicle miles traveled—two examples cited by

SCAQMD, *see* Opp. at 4, for the proposition that states still have some role in the reduction of air pollution.

There is no dispute that States may regulate the use of existing motor vehicles within their jurisdiction. What they simply may not do under Section 209(a) is regulate the *emissions standards* for new motor vehicle sales. Yet that is precisely what SCAQMD's Fleet Rules do. They therefore are preempted.

#### 4. The Legislative History Of Section 209 Further Confirms Congress's Express Preemptive Intent.

The legislative history of the Clean Air Act confirms what the text and structure already make clear: that Section 209(a) "provides *explicit* Federal preemption of the power to set standards on emissions from new motor vehicles and engines." H.R. Rep. No. 90-728, at 36 (1967) (emphasis added). Throughout the House Report accompanying the 1967 Act—which introduced the preemption provision—the Committee emphasized that it was imperative that Congress establish a uniform, nationwide system of emissions regulations for new motor vehicles. *See, e.g., id.* at 21 ("Rather than leave [the question of the extent to which the Federal standards should supercede state and local laws on emissions from motor vehicles] to the uncertainties involved in litigation, the committee has agreed * * * that State laws applicable to the control of emissions from new motor vehicles * * * are superceded."); *id.* at 22 ("The committee therefore decided to provide for uniform administration of standards for motor vehicle emissions, by providing that [ultimately, the Administrator of the EPA] shall administer the program of control of automotive emissions.").

Congress saw fit to make just one discrete and limited exception to its uniform regulatory scheme: the State of California. *See* 42 U.S.C. § 7543(b)(1) (allowing limited waiver of federal preemption for California, as long as "the State standards will be, in the aggregate, at least as protective



of public health and welfare as applicable Federal standards"); *Engine Mfrs. Ass'n* v. *EPA*, 88 F.3d at 1079. Based on California's "compelling and extraordinary conditions requir[ing] more stringent standards," Congress expressly authorized California—in certain circumstances not at issue here—to deviate from an otherwise uniform system. H.R. Rep. No. 90-728, at 21. And while Congress later amended the statute to allow other States to replicate California's program if the State's standards were "identical to the California standards," 42 U.S.C. § 7507, it notably authorized no other exceptions. *Cf. Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.").

SCAQMD has not applied for, and has never received, a statutory waiver of preemption for its Fleet Rules. Nor could it, for its Fleet Rules fundamentally diverge from the federally approved California standards. *See* Pet. App. 23a ("The Fleet Rules require purchasers to choose from among a *subset* of previously certified California vehicles.") (emphasis added). By imposing local variation in the type of motor vehicles that may be purchased or leased in the South Coast District, the Fleet Rules are expressly preempted by Section 209(a).

### B. The Fleet Rules Conflict With The Purposes Of The Clean Air Act.

In addition to being expressly preempted by Section 209(a), the Fleet Rules also are preempted under elementary principles of conflict preemption. *See Geier* v. *American Honda Co.*, 529 U.S. at 873 (local laws are preempted if they "prevent or frustrate the accomplishment of a federal objective"). As we have explained, the Clean Air Act's motor-vehicle-emissions scheme has supplanted piecemeal state regulation with exactly two choices of emissions standards—

national, or (again, in circumstances not applicable here) California. SCAQMD's attempt to supplement this scheme through local regulation hopelessly frustrates this national objective.

While Congress openly recognized that the states had a valid interest in the control of air pollution, it concluded that *only* California had demonstrated the requisite need and ability to set its own motor vehicle emissions standards. *See* H.R. Rep. No. 90-728, at 20 ("While the committee is cognizant of the basic right and responsibilities of the States for control of air pollution, it is apparent that the establishment of Federal standards applicable to motor vehicle emissions is preferable to regulation by individual States.") (quoting H.R. Rep. No. 89-899, at 5); *id.* at 21-22 (allowing an exception for California). Yet not even California was granted unbridled discretion to set emissions standards; the state must first obtain a waiver from the federal government before promulgating new (and conflicting) emissions standards. *See id.* at 22.

Congress endeavored to ensure uniformity in emissions for several reasons:

> to protect the manufacturer against having to build engines which would comply with a multiplicity of standards; to protect the vehicle owner from having to deal with different standards in each state in which he drives; to avoid the unnecessary duplication of federal standards; to avoid 'unnecessary expense' to the owner; and generally to avoid 'chaos' and 'confusion.' [*California ex rel. State Air Resources Board* v. *Department of Navy*, 431 F. Supp. 1271, 1285 (N.D. Cal. 1977), *aff'd*, 624 F.2d 885 (9th Cir. 1980) (internal quotation and citation omitted).][9]

[9] *See also Allway Taxi, Inc.* v. *City of New York*, 340 F. Supp. 1120, 1124 (S.D.N.Y.) (interpreting the legislative history and text of Section 209(a) to conclude that the purpose was "to prevent the burden on interstate commerce which would result if, instead of uniform standards, every state and locality were left free to impose different standards for exhaust emission control devices for the manufacture and sale of new cars"), *aff'd*, 468 F.2d 624 (2d Cir. 1972).



Of course, Congress has not deprived the States from playing *any* role at all in curbing vehicle emissions; as we have explained, *supra* at 17-18, once vehicles have been manufactured, sold, and registered, states may impose use-based emissions regulations (such as carpool lane restrictions) without federal approval. 42 U.S.C. § 7543(d).[10] These exceptions make sense, since they allow States a hand in caring for their own environment while not undermining Congress's strong interest in ensuring that automobile manufacturers are not subjected to a patchwork of disparate emissions standards.

The Fleet Rules, however, frustrate Congress's goal of uniformity by imposing both separate emissions standards and a separate administrative scheme for the fleet vehicles used in the South Coast District. Indeed, the District Court's determination that "[t]he Rules impose no new emission requirements on manufacturers whatsoever," Pet. App. 21a, is demonstrably wrong. By establishing its own requirements for fleet vehicles in its region, SCAQMD forces

[10] States may also adopt clean-fuel vehicle fleet rules, 42 U.S.C. § 7586. Notably, such regulations may only be imposed at the state level *and* require federal approval. Contrary to the lower court's observation, SCAQMD, as a locality, would not be permitted to obtain authorization for its own local Fleet Rules. 42 U.S.C. § 7586 (providing that "states" apply for such authorization). Moreover, there has been no indication that the State of California, or SCAQMD for that matter, has contemplated doing so—especially given that California's federally approved program allows vehicles that SCAQMD's Fleet Rules expressly prohibit fleet operators in the District from purchasing or leasing.

manufacturers to incorporate localized standards into their production and distribution schemes. Yet Congress has firmly warned against this kind of a disruption to the manufacturing process:

> The manufacture of automobiles is a complex matter, requiring decisions to be made far in advance of their actual execution. The ability of those engaged in the manufacture of automobiles to obtain clear and consistent answers concerning emission controls and standards is of considerable importance so as to permit economies in production. [H.R. Rep. No. 90-728, at 21.]

More fundamentally, to sanction SCAQMD's Fleet Rules would invite every political subdivision in the country to adopt its own unique set of emissions standards—whether limited to "fleets" or otherwise. *Cf. Healy* v. *Beer Inst., Inc.*, 491 U.S. 324, 340 (1989) ("[I]f Connecticut may enact a contemporaneous affirmation statute, so may each of the border States and, indeed, so may every other State in the Nation."). If, for example, another subdivision imposes similar or even more stringent emissions standards on fleet vehicles, an entire line of federal- and California-approved vehicles could be phased out, without any EPA input. Congress has censured exactly that result, noting that "[w]hile manufacturers could meet [the problems of differing regulations] by building vehicles that meet whichever standard is the more stringent, this would lead to increased costs to consumers nationwide * * *." H.R. Rep. No. 90-728, at 22. Given Congress's strong desire to avoid "undue and unnecessary expense to the user," S. Rep. No. 89-192, at 8, such a practice cannot be tolerated.

Allowing regulations like the Fleet Rules also would likely result in state and local governments imposing different mixes of emissions levels on fleet vehicles within their jurisdictions. This amalgamation of various emissions



requirements and administrative schemes would conjure up the "spectre of an anarchic patchwork of federal and state regulatory programs [that would] create nightmares for the manufacturers," *Motor & Equipment Mfrs. Ass'n*, 627 F.2d at 1109, and result in the very "chaos insofar as manufacturers, dealers, and users are concerned" that prompted Congress to preempt local emissions laws in the first place. S. Rep. No. 89-192, at 6.

Whether any other political subdivision would soon follow SCAQMD's lead in attempting to dictate its own emissions standards, just these Fleet Rules alone have already created administrative and manufacturing difficulties for all entities involved in the automotive industry. That is precisely the sort of intolerable federal-state conflict that justifies preemption. The Fleet Rules should be invalidated.

### C. Congress Has Indicated An Intent To Occupy The Entire Field Of Regulation Relating To Emissions From New Motor Vehicles.

Section 209(a) expressly preempts the Fleet Rules. It also impliedly preempts the Fleet Rules. And preemption of the Fleet Rules is further confirmed by Congress's intent to exclusively occupy the new motor vehicle emissions field of regulation.

This Court generally finds field preemption where the "scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or the Act in question "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). That is the case here.

To begin with, the Clean Air Act's preemption scheme has long been construed by this Court and the federal courts of appeals as imposing federal control over the entire field of vehicle-emissions regulation. *See Washington* v. *General*

*Motors Corp.*, 406 U.S. 109, 114 (1972) ("Congress has largely pre-empted the field with regard to 'emissions from new motor vehicles.' ") (citing to the former codification of Section 209(a)); *Engine Mfrs. Ass'n* v. *EPA*, 88 F.3d at 1079 ("In contrast to federally encouraged state control over stationary sources, regulation of motor vehicle emissions had been a principally federal project."); *Motor Vehicle Mfrs. Ass'n* v. *New York State Dep't of Envtl. Conservation*, 79 F.3d 1298, 1302 (2d Cir. 1996) ("In general, state regulation of automotive tailpipe emissions is preempted by the federal Clean Air Act."); *Motor & Equipment Mfrs. Ass'n*, 627 F.2d at 1109 ("Congress in 1967 expressed its intent to occupy the regulatory role over emissions control to the exclusion of all the states—all, that is, except California."); *City of Chicago* v. *General Motors Corp.*, 467 F.2d 1262, 1264 (7th Cir. 1972) (Section 209(a) preempts the "entire field of standards for emissions from new motor vehicles"). In fact, Congress's control over the field is so pervasive that courts have found preempted not only emissions requirements directly imposed on manufacturers, but also those imposed on consumers as well. *See Sims*, 862 F.2d at 1454-55; *Townsley*, 804 F.2d at 1411; *Huston*, 190 F. Supp. 2d at 928-929; *Bowers*, 639 F. Supp. at 355-357.

Events leading to the passage of the Clean Air Act make clear that when Congress ultimately entered the field of emissions regulation, it did so to occupy it to the exclusion of the States. Thus, two years before enacting Section 209, Congress had authorized federal emissions regulations without any restrictions on the States' involvement. *Motor & Equipment Mfrs. Ass'n*, 627 F.2d at 1108. That experiment failed. *See Motor Vehicle Mfrs. Ass'n, Inc.* v. *New York State Dep't of Envtl. Conservation*, 17 F.3d 521, 524-525 (2d Cir. 1994); *Engine Mfrs. Ass'n*, 88 F.3d at 1079; *Motor & Equipment Mfrs. Ass'n*, 627 F.2d at 1109. Thus was born Section 209(a), prohibiting the states from adopting their own standards. *See Engine Mfrs. Ass'n*, 88 F.3d at 1079. As



we have explained, in deciding to enter the field and displace state regulation, Congress sought to vindicate a compelling national interest in uniform federal regulation. *See* H.R. Rep. No. 90-728, at 20-23. Aside from making a limited exception for California, Congress simply left no room for state interference.

### D. The Ninth Circuit's Careless Decision Should Be Reversed, Lest It Become The Baseline For Analyzing An Express Preemption Clause.

The brief for the petitioners, and those of amici associated with the automobile industry, quite correctly emphasize the effect of the ruling below on automobile manufacturers, fleet owners, and buyers. The decision's broader potential for creating havoc in express preemption cases, however, also should not be overlooked. In an opinion lauded as "well-reasoned" by the Ninth Circuit and adopted by that court without further ado, the District Court imposed on the Clean Air Act's express preemption clause a strained counter-textual reading of the statute that preserved a plainly pre-empted local emissions regulation, all in the face of compelling and directly contrary precedent—not to mention common sense. This Court should not lightly tolerate the semantic gymnastics that led to the decision here—*e.g.*, a "purchase" is substantively different from a "sale," and a "standard" is not a "standard" unless it is a "numerical control." If upheld, those facile conclusions will spawn other equally superficial distinctions in other preemption cases, until the unadorned text of an express preemption clause becomes only the jumping-off point for clever lawyers to introduce needless confusion into plain words.

The Fleet Rules are preempted by the Clean Air Act's express preemption provision, every which way—expressly, impliedly, and across the field. The Ninth Circuit's ruling to the contrary should be reversed.

## CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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No. 02-1343

Supreme Court, U.S.
FILED
NOV 17 2003
OFFICE OF THE CLERK

# In The Supreme Court of the United States

ENGINE MANUFACTURERS ASSOCIATION AND WESTERN STATES PETROLEUM ASSOCIATION,

*Petitioners,*

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, ET AL.,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

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## QUESTION PRESENTED

Does the Clean Air Act preempt local regulation of specialized vehicle fleets, most of them government-owned, requiring that fleet operators who replenish or expand their fleets must purchase clean-fuel vehicles that are already California-certified under the Act if such vehicles are commercially available, where manufacturers are not required to produce or sell any particular vehicle?

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## INTRODUCTION AND SUMMARY OF ARGUMENT

*Amici* States,[1] drawn from across the country, contain approximately 160 million people, or over half of the total population of this nation.[2] To protect the health of their residents and the strength of their economies, States need to be able to use the most varied and effective tools, including market-based requirements, to attack some of the worst air pollution problems in the nation and, indeed, in the world. Tens of millions of *amici* States' residents live in air basins that exceed the health-based National Ambient Air Quality Standards that Congress has ordered the States to meet. In several of the *amici* States, pollutant emissions from vehicles either compete with or have replaced emissions from stationary sources, such as factories and refineries, as the largest contributors to air pollution. Vehicle emissions are often the most dangerous to public health. For example, in the greater Los Angeles area covered by Respondent South Coast Air Quality Management District ("SCAQMD"), approximately 70% of the cancer risk posed by air pollution comes from air contaminants emitted by diesel vehicles.[3]

To reduce this serious cancer risk to the millions of people who live and work in the South Coast Air Basin,

---

[1] The Attorneys General file on behalf of their respective States, pursuant to Rule 37.4. The Pennsylvania Department of Environmental Protection files pursuant to the consent filed by the parties to this case, consenting under Rule 37.2(a) to the filing of all timely *amicus curiae* briefs.

[2] Figures come from the 2000 census, as reported at the Census Bureau website, www.census.gov.

[3] South Coast Air Quality Management District, *Multiple Air Toxics Exposure Study in the South Coast Air Basin (MATES-II)*, March 2000, p. ES-3.

the SCAQMD adopted the Fleet Rules at issue here. The Fleet Rules require owners of fleets of specified vehicle types (*e.g.* buses, airport shuttles), when they replenish or expand those fleets, to choose from among the cleanest vehicles commercially available to them, and to buy clean-fueled, non-diesel vehicles if such non-diesels are commercially available. If no qualified clean-fuel vehicle is certified, the fleet owner may buy a CARB-certified diesel vehicle.

No requirement is placed upon any manufacturer to build, certify or offer any particular vehicle for sale. In the Clean Air Act, Congress expressed its intent that manufacturers be required to build no more than two versions – a federal and a California version – of any particular model vehicle; no "third car" could be required. The Fleet Rules comply with this intent; no "third car" can possibly be required by the Fleet Rules, since those Rules only require the purchase of vehicles that are already CARB-certified.

Respondent's Fleet Rules may change the market share of various manufacturers. However, the Act does not mandate a "buy-from-the-bottom" requirement on States or localities, that they provide a guaranteed market for vehicles whose emissions increase cancer and other serious health risks.

The Clean Air Act ("CAA" or "Act") places the primary responsibility for meeting the health-based national ambient air quality standards squarely on the States, and imposes heavy penalties if States fail. The cooperative federalism embodied in the Clean Air Act has always allowed the States to use a wide range of tools to control both stationary and vehicular air pollution. The Fleet Rules are an attempt to use a tool beyond traditional mechanical, tailpipe pollution reduction devices. The Fleet Rules do not directly apply to vehicle manufacturers at all,



but instead set limits on what a fairly limited number of purchasers of specialized fleet vehicles may buy, rather than on what manufacturers must produce. They are what might be called "demand-side" regulations, rather than "supply-side" regulations.

The Fleet Rules are presumed valid and not preempted, because the field of air pollution control in general is an area of traditional state regulation, and motor vehicle emissions in particular is an area where the States regulated for years before there was any federal presence.

In enacting the Clean Air Act, Congress did not intend to preempt the Fleet Rules, either by express or implied preemption. The Fleet Rules are not expressly preempted because they are not actual emissions "standards", i.e., the numeric limits on emissions that set production mandates for manufacturers to which Congress referred in Section 209(a). Textual analysis of Section 209, of the Act's fuel content provisions, and of the transportation and market incentive provisions that can be required in nonattainment areas shows that the preemption of emissions control standards in Section 209(a) is a narrow one that encompasses only such production mandates, and not all regulations intended to reduce motor vehicle emissions.

Many States and urban areas have vehicle-caused air pollution problems that demand regulatory solutions that go beyond the reach of tailpipe "standards." As an example, New Yorkers drove over 125,000,000,000 miles in 1996, creating formidable air pollution problems. To meet them, New York has adopted California's standards, and may consider rules such as the Fleet Rules in the future. Both New York State and New York City restrict motor vehicle engine idling as a means of reducing air pollution in the areas where the most people are exposed to it, and

need to exercise their retained authority to control vehicle pollution, in order to protect the health of their residents.

Nor are the Fleet Rules subject to implied preemption. The Act has never fully preempted the field of motor vehicle emission control, and Congress did not intend to occupy the entire field of motor vehicle emission control by enacting Section 209. It has always granted to California, and to other States that adopt California's emissions control standards, the right to regulate vehicle emissions almost co-equally with the federal government. Further, the savings clause of Section 116 of the Act makes clear that only certain motor vehicle emissions controls, not all such controls, are preempted. Congress intended to preclude regulations that place production mandates on manufacturer, requiring them to build a "third vehicle," something the Fleet Rules do not do.

Finally, the Fleet Rules do not stand as an obstacle to the fulfillment of any purpose of Congress in the Clean Air Act. To the contrary, they stand as a type of market-based regulation that advances Congress's purposes of: 1) promoting clean air; 2) allowing States the maximum flexibility to adopt regulations that will meet the federal air quality standards; 3) allowing States and localities to serve as emissions control laboratories for the nation (especially for motor vehicle controls); and 4) preventing manufacturers from being required to produce more than two versions of any vehicle. The Fleet Rules are valid and not preempted.

Technological controls on cars, trucks, and buses are being pushed to the limits that engineering can achieve, and still the air that millions of *amici* States' residents breathe poses a serious risk of respiratory illness, even cancer. *Amici* States respectfully request that the Court recognize Congress's intent to allow States to use the



fullest legal range of tools to attack the critical problem of air pollution, to protect the health and well-being of millions of their residents.

## ARGUMENT

### I. THE FLEET RULES ARE NOT PREEMPTED, BOTH BECAUSE THEY ARE REGULATIONS OPERATING WITHIN AN AREA TRADITIONALLY REGULATED BY STATES AND LOCALITIES, AND BECAUSE THEY ADVANCE THE PURPOSES OF THE CLEAN AIR ACT TO IMPROVE AIR QUALITY THROUGH COOPERATIVE FEDERALISM

Petitioners ask the Court to hold, in effect, that as a matter of law, the Act, 42 U.S.C. section 7401 *et seq.*, guarantees to manufacturers a right to sell from the bottom, an absolute right to sell the dirtiest of their new certified trucks and buses in all parts of all States, to all customers, free of any local limitations related to air quality. They further seek a ruling that, as a matter of law, Congress disabled all local agencies, no matter how carefully crafted the regulations or how extreme the air pollution problem, from requiring that fleets be directed to buy from among the cleaner new trucks and buses that are otherwise certified, instead of from the dirtiest. *Amici* States believe that the Clean Air Act grants petitioners no such right.

#### A. Under Generally Applicable Preemption Principles, the Fleet Rules Are Presumed to be Valid and Not Preempted.

1. Petitioners here argue express preemption of the Fleet Rules, citing Section 209(a) of the Clean Air Act, 42 U.S.C. § 7543(a):

> No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

In a case of express preemption, the Court has said that its task is to "'identify the domain expressly preempted' by that language." *Medtronic v. Lohr,* 518 U.S. 470, 484 (1995) (quoting *Cipollone v. Liggett Group*, 505 U.S. at 517 (1992)). The intent of Congress is the touchstone of all preemption analysis. *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963).

2. The Fleet Rules come to this Court with the strong presumption that they are valid and not preempted. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) holds that the Court "start[s] with the presumption that the historic police powers of the States were not to be superseded by [a federal statute] unless that was the clear and manifest purpose of Congress." *Id.* See, also, *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state laws.") The same presumption applies to local laws and regulations. *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 605 (1991).



The presumption against preemption of state and local police power measures is rooted in principles of federalism. *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996). At least some measure of a presumption exists "in all preemption cases." *Id.* This Court has observed that the courts should be slow to find federal preemption, "[f]or the State is powerless to remove the ill effects of our decision, while the federal government, which has the ultimate power, remains free to remove the burden." *Penn Dairies v. Milk Control Comm'n*, 318 U.S. 261, 275 (1943). The presumption against preemption applies not only to the initial determination of preemption, but also to the scope of any preemption that is found. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518.

The Fleet Rules being challenged are "designed to foster public health," an area that falls within the police power, *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440, 442 (1960), and as such are presumed not to be preempted unless Congress has stated a clear intent to do so. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715-718 (1985).

And, as the Court held in *Pharmaceutical Research, et al. v. Walsh*, __ U.S. ___, 123 S.Ct. 1855, 1869 (2003) (internal citation omitted):

> The presumption against federal pre-emption of a State statute designed to foster public health has special force when it appears . . . that the two governments are pursuing common purposes.

See also, *New York State Dept. of Social Servs. v. Dublino*, 413 U.S. 405, 421 (1973).[4] Here, the federal and the local governments are pursuing common purposes, namely clean air and protection of public health.

### B. The Clean Air Act Gives States a Primary Role in Controlling Motor Vehicle Emissions.

The analysis begins with the actual text of the statute, *Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in judgment), but it does not end there. The Court also "look[s] to the provisions of the whole law and to its object and policy." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987). Where there is any ambiguity in the text, the Court may examine the legislative history of the statute to determine the intent of Congress. See, *e.g.*, *Medtronic*, 518 U.S. at 490 (emphasis added) ("An examination of the basic purpose of the legislation, *as well as its history* entirely supports our rejection of Medtronic's extreme position.").

Far from creating a monolith of federal preemption, the Act has from the very first authorized and encouraged a state program for control of motor vehicle emissions, a

[4] The Clean Air Act's programs, like the Aid to Families with Dependent Children program addressed in *Dublino*, are intensely complex, and form a mixture of very precise Congressional directives *and* of broad grants of authority and regulatory mandates to the States. *Dublino* has special force here, holding that the complexity of a federal statute should not be regarded by itself as proof of Congressional intent to preempt state law. *Dublino*, 413 U.S. at 415.



state program that stands alongside but operates largely independent of the federal program.

1. *Vehicle emission control is an area of traditional state regulation.* States regulated air pollutant emissions,[5] and vehicle pollutant emissions,[6] well before the federal government did. California, in particular, has regulated motor vehicle emissions continuously for as long as there have been motor vehicle emissions control regulations in this country, years before the federal government entered this regulatory area. In 1960, California passed the Motor Vehicle Control Act,[7] and created the Motor Vehicle Pollution Control Board to set emissions limits and certify emissions control devices for motor vehicles.[8] By 1967, California had already required specific emissions control devices on cars registered in California.[9] Seven other

[5] The federal Department of Health, Education, and Welfare reported in 1963 that forty States regulated air pollution at that time. U.S. Department of Health, Education, and Welfare, A Digest of State Air Pollution Laws (Public Health Service) 1963.

[6] A. Reitze, "Overview and Critique: A Century of Air Pollution Control Law: What's Worked; What's Failed; What Might Work" 21 Envtl. L. (1991) 1549, 1570-81.

[7] Cal. Health and Saf. Code sections 24378-24398, repealed Stats 1967, chapter 1545, § 4.

[8] Brestel, *Note: The California Motor Vehicle Pollution Control Law* (1962) 50 California Law Review, 121, 122.

[9] Cal. Health and Safety Code, Stats 1967, chapter 1545, § 5, requiring "[e]very 1963 or later motor vehicle subject to registration" in California to have a CARB-certified device to control crankcase emissions, and "[e]very 1966 or later motor vehicle subject to registration" in California to have CARB-certified devices for both crankcase and exhaust emissions control.

States and the District of Columbia also regulated motor vehicle emissions prior to the federal government.[10]

Not until 1965 did Congress enact the federal Motor Vehicle Air Pollution Control Act. Not until 1967 did Congress even purport to preempt state control of vehicle emissions, and then it expressly exempted the state program that California was already enforcing.[11]

Rather than being an area where the federal interest has always predominated, control of motor vehicle emissions started at the state and local level, with the federal government never quite catching up.

2. *From the beginning, Congress enacted only a partial federal preemption of vehicle emissions control.* Petitioners portray Section 209(a) of the Act, 42 U.S.C. § 7543(a), as completely preempting state and local control of vehicle emissions. In fact, Section 209(a) preempts only the setting of standards that impose production mandates on manufacturers, not all controls on motor vehicle emissions. And even as to production mandates, the preemption is only a partial one. Congress established a waiver provision in Section 209(b), 42 U.S.C. § 7543(b), that is extraordinary, and may be unique in federal law. Section 209(b) gives explicit authority for a state vehicle emissions

[10] U.S. Department of Health, Education, and Welfare, A Digest of State Air Pollution Laws (Public Health Service) 1963, at 12, 39, 45, 92, 94, 114, 124, 139, 161.

[11] Pollution and Policy, a Case Essay on California and Federal Experience with Motor Vehicle Air Pollution, J. Krier and E. Ursin (1977), cited by Petitioners, states that "[t]he almost empty history of federal air pollution control developments prior to mid-twentieth century stands in contrast to federal actions with respect to water pollution." *Id.* at 47.



control program in California that sits alongside, but is largely independent of, the federal program.

Congress granted this state program considerable autonomy, presumptively granting a waiver of federal preemption to California, unless the U.S. EPA finds that California is wrong in its technical judgement of need or technological feasibility.[12] The U.S. EPA's review of California's judgement about need and feasibility is narrow.[13] U.S. EPA routinely approves waivers even when it disagrees with California's policy choices, carrying out the dictate of Congress in Section 209(b).[14] Under the 1977 amendments to the Act, Congress allowed California to adopt a package of emissions standards, even if individual standards within that package were *less* stringent than their federal counterparts. *Motor and Manufacturers Association v. Environmental Protection Agency*, 627 F.2d 1095, 1110-11 (D.C. Cir. 1979). The Clean Air Act has never contained a complete federal preemption of motor vehicle control, but has allowed a nearly autonomous state program from the beginning.

[12] A House version of the waiver provision proposed by Representative Dingell, would have required California to demonstrate to the U.S. EPA Administrator's satisfaction that California had an extraordinary need for its own standards, and would have left the decision, and any exercise of discretion, in federal hands. H.R. Rep. No. 90-728, 22. That version did not pass.

[13] 49 Fed. Reg. 18887 (May 3, 1984) ("Congress intended that the standard of EPA review of the State decision be a narrow one.") See, also, 40 Fed. Reg. 23102, 23103 (May 28, 1975). See, also, 40 C.F.R. Part 85, § 85.1606, 46 Fed. Reg. 62366 (Dec. 23, 1981), 49 Fed. Reg. 18887 (May 3, 1984), 59 Fed. Reg. 48625 (September 22, 1994).

[14] See, *e.g.*, 36 Fed. Reg. 17458, at 17459 (August 31, 1971), 40 Fed. Reg. 23102, 23104 (May 28, 1975).

3. *In 1977, Congress expanded the independent state vehicle emissions control program.* In the 1977 amendments to the Act, Congress further expanded explicit authority for the state motor vehicle emissions standard program by enacting Section 177 of the Act, 42 U.S.C. § 7507, which allows other States to adopt California's vehicle emissions standards. These States do not need to demonstrate an extraordinary need for more protective standards than the federal ones, as California must do, nor do they need an explicit waiver of federal preemption. If an individual State has State Implementation Plan ("SIP") provisions that call for the vehicle emissions reductions that California's standards provide, it is that State's choice whether to adopt those standards; U.S. EPA has no power to grant or deny a waiver under Section 177. The State need only notify the U.S. EPA of its decision to opt into the California standards.[15]

Further, the Act places no cap on the number of qualifying States that may adopt California's vehicle

[15] As the U.S. EPA has stated in the context of offroad vehicle emissions standards:

> [T]he Act neither requires that States obtain EPA authorization to impose California's nonroad engine standards nor authorizes the Agency to require that States do so. . . . [A]ny State which has plan provisions approved under part D of Title I of the Act (generally States within ozone nonattainment areas) may adopt and enforce, "after notice to the Administrator," California standards. Language requiring that other State request and receive authorization from EPA is noticeably absent. Indeed, the statutory text reads as authorizing States to adopt California standards on their own volition.

59 Fed. Reg. 36969, 36983 (July 20, 1994).



emissions control program; many States have adopted California's vehicle emissions control package, including *amici* States Maine, Massachusetts, New York and Vermont, and more may do so as the need arises. While the Fleet Rules at issue here are not state rules, nor subject to a Section 209(b) waiver, the actual provisions and legislative history of the Act, and several decades of regulatory interpretation of the Act by U.S. EPA, all demonstrate that federal preemption of vehicle emissions has always been limited in scope, and has become steadily more limited over the years.

4. *The California/multi-state program advances cooperative federalism by allowing States and localities to act as laboratories for the nation, as Respondent SCAQMD has done here.* A narrow reading of Section 209(a) reflects and advances the structure and purpose of the Clean Air Act as a "bold experiment in cooperative federalism." *Connecticut v. Environmental Protection Agency*, 696 F.2d 147, 151 (2d Cir. 1982). Courts have recognized that the Act is "an intergovernmental partnership to regulate air quality," *Michigan v. Environmental Protection Agency*, 268 F.3d 1075, 1078 (D.C. Cir. 2001), with the U.S. EPA setting national air quality standards and providing technical and financial support and back-up enforcement, but with primary responsibility for meeting the national standards imposed by Congress upon the States. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 845-846 (1984). Given the enormity and importance of the task, and the severity of the consequences of

failure,[16] the Act provides that the States – who have the ultimate responsibility for cleaning the air – have the primary choice of what control measures to use. *Union Electric Co. v. Environmental Protection Agency*, 427 U.S. 246, 250 (1976). In setting up this structure of cooperative federalism, Congress relied upon one of the great strengths of federalism: the ability of States to serve as laboratories for the nation, trying experiments in regulation that may, or may not, serve as models for the other States or the nation as a whole. *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932), (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country.") The multi-state automotive regulatory program, spear-headed by California, has served as just such a laboratory for the nation in vehicle emissions control. As U.S. EPA Administrator Ruckelshaus observed:

> [T]here is a well-established pattern that emission control advances have been phased in through use in California before their use nationwide.

38 Fed. Reg. 10317, 10324 (April 26, 1973.)

In 1981, the National Commission on Air Quality observed that California's standards tend to lead federal standards by two to five years, showing the value of the

[16] Such consequences include withholding of federal highway funds, 42 U.S.C. 7509(b)(1), and direct imposition of federal control plans, 42 U.S.C. 7410(c).



state program to the nation. National Commission on Air Quality, *To Breathe Clean Air*, 197 (1981). The California/multi-state vehicle emissions control program is probably one of the most solid and consistent successes of cooperative federalism, repeatedly forcing and proving new and innovative technology that can be applied nationwide to support increasingly stringent federal vehicle emission standards.[17]

The enactment of Section 177, and its open-ended authorization of the use of California standards by other States, shows that Congress intended this "laboratory" model to continue and expand. The Fleet Rules exemplify one of the main benefits of the California/multi-state program: allowing those States that need greater emissions reductions from automotive sources to obtain them *without* imposing the costs of more stringent vehicle controls on the country as a whole.

### C. Section 116 of the Act Expresses Congress's Intent to Limit Federal Preemption and Authorize More Stringent State Controls.

The savings clause contained in Section 116 of the Act, 42 U.S.C. § 7416, also supports the narrowest possible interpretation of the preemptive scope of Section 209(a). That Savings Clause names only three sections of the Act

[17] Respondent SCAQMD has served as the nation's laboratory before, as recognized by U.S. EPA on numerous occasions. 59 Fed. Reg. 23264, 23307 (May 5, 1994) (federal plan for Sacramento and Ventura areas incorporates several controls based on SCAQMD models); 59 Fed. Reg. 48664, 48681-82 (Sept. 22, 1994) (noting SCAQMD's work developing market incentives).

as being preemptive, including Section 209(a). The clause then characterizes these three sections as only "preempting *certain* State regulation of moving sources," not *all* such regulation. 42 U.S.C. § 7416 (emphasis added). The main thrust of Section 116 is that any State or political subdivision of a State retains the right to adopt more stringent standards or control measures than those mandated by Congress.

Also, Section 116 affirmatively declares the right of any "State *or political subdivision thereof*" to adopt more stringent standards and regulations than the federal ones, except for those few federal controls on mobile sources. 42 U.S.C. 7416 (emphasis added). The Act emphasizes at every point the primacy of States and localities in air pollution control.[18] The declaration in Section 116 of States' and localities' retained authority shows a lack of congressional intent to preempt the entire field of mobile source emission control, and an express intent to keep the scope of preemption narrow.

### D. The Term "Standards Relating to the Control of Emissions" as Used in Section 209 Refers Only to Numerical Standards, Not Market Controls Such as the Fleet Rules.

Central to petitioners' claim of federal preemption of the Fleet Rules is an overly simplified and overly expanded definition of the words "standards relating to control of emissions" in Section 209(a). Petitioners claim

[18] See, *e.g.*, 42 U.S.C. § 7401(a)(3), where in Congress found "that air pollution [ ] control at its source is the primary responsibility of States and local governments. . . ."



that those words encompass not merely any and all *standards* adopted by States or localities to reduce motor vehicle pollutant emissions, but any and all state or local *regulations* adopted with that intent, including regulations such as the Fleet Rules, which do not, by their own terms, directly apply to manufacturers. The argument should be rejected.

1. *The Words "Relating to" in Section 209(a) Do Not Expand the Scope of The Act's Preemption.* Petitioners and the United States argue that the words "relating to" in Section 209(a) expand the scope of federal preemption to virtually any state or local regulatory measure that affects new motor vehicles and is intended to reduce emissions. The argument should be rejected, and the phrase "relating to" should be construed to draw in only those rules that are inconsistent with Congress's objectives in the Act.

The words "related to" have in the past been interpreted to have a broad meaning, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-85 (1992), but in *New York State Conference of Blue Cross & Blue Shield Plans, et al. v. Travelers Insurance Co., et al.*, 514 U.S. 645 (1995) (upholding significant state law surcharges on hospital costs paid by insurers under employment benefit plans), the Court recognized the lack of meaning inherent in such broad construction:

> [O]ne might be excused for wondering, at first blush, whether the words of limitation ("insofar as they . . . relate") do much limiting. If "relate to" were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for "[r]eally, universally, relations stop nowhere."

*Id.* at 655. As Justice Scalia noted in another case, "everything is related to everything else." *California Division*

*of Labor Standards Enforcement, et al. v. Dillingham Construction, N.A., Inc., et al.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring).

In *Travelers*, therefor, the Court determined that it "must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the [federal] statute as a guide to the scope of the State law the Congress understood would survive." 514 U.S. at 656. The Court also looked to the nature of the effect of the state law on the federal statutory scheme, and found that the state law's "indirect economic effects on the relative costs of various health insurance packages in a given State" did not have a sufficiently direct impact on the federal scheme of uniformity as to require preemption. *Travelers*, 514 U.S. at 661-62. Only significant impacts are preempted. The Court applied this same analysis in its subsequent unanimous opinion in *Dillingham*, focusing on Congress's objectives and whether the challenged state law conflicts with those objectives in any significant way. *Dillingham*, 519 U.S. at 325.

Congress had clear objectives in enacting the Act's motor vehicle emissions control provisions: to clean the air and to reduce vehicle pollutant emissions through an exercise in cooperative federalism in which the U.S. EPA sets the floor of emissions standards; California is allowed to adopt more exacting emissions controls; other States, under Section 177, are allowed to adopt California's standards; and vehicle manufacturers are not required to build more than two versions of any model vehicle. The Fleet Rules conflict with none of these objectives. In fact, they further each.

2. *"Standards," as used in Section 209, means numerical limits on emissions that impose production*



*mandates on manufacturers.* The term "standard" as used in Title II of the Act is not expressly defined in Section 209, *Motor Vehicle Mfrs. v. NYS Dept. of Conservation*, 17 F.3d 521, 533 (2nd Cir. 1994), or in Title II as a whole. However, for purposes of preemption analysis, this Court may look at both the text and the structure of the Act, and the context of Title II, to determine the meaning Congress intended it to have there. *Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 96. *Amici* States believe that the intended meaning of the term "standard relating to control of emissions," as it is used in Section 209, is a requirement that is: (1) imposed directly upon a manufacturer as a condition of certifying its vehicles for sale; and (2) numerical, a specified number of grams of a given pollutant that may be emitted per mile driven or per unit of energy exerted[19], or a concentration in parts per million or other unit of measurement that may be emitted by a vehicle the manufacturer certifies.[20] That is the only meaning that comports with all the Act's provisions.

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[19] Standards for heavy-duty engines are generally expressed in grams per brake-horsepower hour, a standard that measures emissions in proportion to the amount of energy expended by the engine. See, *e.g.*, 40 C.F.R. Part 86, § 86.007-11. A few emissions standards are expressed by other numeric means, such as a standard for evaporative emissions, which may be expressed as a per-test numeric limit. See, *e.g.*, 40 C.F.R. Part 86, § 86.008-10.(b).

[20] Such a numerical standard may also be expressed in terms of a fleet average, or a mandate that a certain percentage of the fleet meet specified emissions levels (such as a requirement that a specified percentage be zero emission vehicles). This is also a "standard," imposed directly on the manufacturer and directly linked to a specific emissions limit. Congress's very deliberate care how and when it used the term "standard" further shows its lack of desire to preempt the entire field of vehicle emissions control.

Congress used the term "standards," as applied to motor vehicle emissions, throughout Section 202 of the Act, and its use there shows the meaning Congress ascribed to it. Section 202 authorizes and directs the Administrator of U.S. EPA to adopt "standards applicable to the emission of any air pollutant" from motor vehicles. These "standards" are numerical standards that prescribe the maximum level of pollutants that new motor vehicles may emit, and that manufacturers must meet in their vehicles in order to certify the vehicles as legal for sale. "Standards" focus and depend on technology and hardware, as shown by the elaborate detail in Section 202 regarding the requirements for availability, lead time, and cost of technology to meet the federal standards. See, *e.g.*, 42 U.S.C. §§ 7521(a)(1), 7521(a)(2), 7521(a)(3). Section 202 specifically refers to standards "which reflect the greatest degree of emission reduction achievable *through the application of technology* which the Administrator determines will be available for the model year to which such standards apply. . . ." 42 U.S.C. § 7521(a)(3)(A)(i) (emphasis added).[21]

2. *Congress's intent can also be seen in subdivision (b) of Section 209, which allows California to obtain a waiver of federal preemption and set its own vehicle*

[21] See Section 202(b)(1)(A) (emissions standards for light-duty vehicles, expressed in grams per mile); Section 202(g)(1) and (2) (emissions standards for light-duty trucks, expressed in grams per mile); Section 202(h) (emissions standards for later light-duty trucks, expressed in grams per mile); Section 202(j)(1) and (2) (cold carbon monoxide emissions standard, expressed in grams per mile, with phase-in schedule); Section 202[n] (emissions standards for post-1990 buses, expressed in grams per brake horsepower hour); Section 207(c)(4) (emissions standards for light-duty trucks, expressed in grams per mile).



*emissions standards.* To qualify for a waiver of preemption, California must show, *inter alia*, that its proposed standards meet the requirements set in Section 202 for federal emission standards (that is, that the requisite technology will be available with sufficient lead time). 42 U.S.C. § 7543(b)(1)(C). Congress thus intended the waived Section 209(b) "standards" to be the same type of standards as the Section 202 standards: numerical, technology- and hardware-based production mandates imposed directly on manufacturers. There is no other logical reading of Section 209(b)(1)(C).

U.S. EPA has consistently applied this definition in its decisions granting waivers of Section 209(a) to California,[22] and the District of Columbia Circuit has upheld that interpretation. In *Motor and Equipment Mfrs. Ass'n, Inc. v. Environmental Protection Agency*, 627 F.2d 1095, 1111-12 (D.C. Cir. 1979), *cert. den.*, 446 U.S. 592 (1980), the court upheld the position of the U.S. EPA Administrator in a contested waiver decision. It held that, as used in Section 209, "the word 'standards' connotes a *numerical value* setting the *quantitative level* of permitted emissions of pollutants by a new motor vehicle" (emphasis added), rejecting the view "that 'standards' means *any* regulation relating to motor vehicles." *Motor and Equipment Mfrs.*,

[22] See, *e.g.*, 36 Fed. Reg. 17458 (August 31, 1971), 42 Fed. Reg. 3192, 3193 (January 17, 1977), and 43 Fed. Reg. 9344, 9346 (March 7, 1978), each setting out difference between a standard (numerical value) and enforcement procedures (tests to determine whether numerical standard has been met); and 41 Fed. Reg. 44209, 44212 (October 7, 1976), explaining difference between a standard (numerical value) and the length of time a vehicle must meet that standard.

627 F.2d 1112 (emphasis added). The court went on to hold:

> The legislative history also indicates that Congress intended the word "standards" in section 209 to mean quantitative levels of emissions rather than regulations involving certification or in-use maintenance restrictions. The Senate Report on the Air Quality Act of 1967, discussing the preemption provision, mentions "standards" for hydrocarbons, nitrogen oxides, and carbon monoxide in obvious reference to the numerical limitations on those pollutants. S.Rep.No. 403, 90th Cong., 1st Sess. 32 (1967.)

*Id.*

The reasoning of the *Motor and Equipment Mfrs.* court applies here equally: not every regulation relating to vehicle emissions is preempted by Section 209, only regulations directly setting numerical emissions limits that manufacturers must meet.

### E. Section 209(a)'s Preemption Was Intended to Cover Only Regulations That Control Emissions *and* Mandate That Manufacturers Produce Vehicles to Meet Them; It Embodies the Two-Car Compromise That Balances Clean Air with Manufacturers' Needs.

That the Fleet Rules are not "standards" for purposes of Section 209(a)'s federal preemption can also be seen by the fact that no manufacturer is legally required to produce vehicles to meet the Fleet Rules, in order to offer its vehicles for sale in California. The Fleet Rules contain no production requirement for manufacturers, just as they



contain no numerical emissions limitation, and no certification requirement other than the California Air Resources Board certification that the manufacturer must obtain in order to offer the vehicle for sale in California.

The Fleet Rules do not require any manufacturer to produce any vehicle that it does not choose to produce and certify for California. On the contrary, the Fleet Rules require covered fleet owners to buy the specified clean-fuel vehicles *only* if they are already certified for sale in California. If no manufacturer chooses to make and certify in California a vehicle that meets Fleet Rule requirements, the fleet owner may buy any California-certified vehicle, even if it would otherwise violate the Fleet Rules.

This is the point upon which *American Auto Mfrs. Ass'n v. Cahill*, 152 F.3d 196 (2d Cir. 1998) and *International Auto Mfrs. v. Commissioner*, 208 F.3d 1 (1st Cir. 2000), cited by Petitioners, Pet. Brf. at 23, 42, are inapposite. Those cases held that Section 177 States (States that have adopted California's standards) could not *mandate* the production, certification, and offering for sale by manufacturers of certain numbers or percentages of zero-emission vehicles ("ZEVs"), which were expected to be electric cars, in those States. *Cahill*, 152 F.3d at 200 (ZEV sales requirement mandated a specified percentage of cars sold must be ZEVs); *International Auto*, 208 F.3d at 6 (same). Here, there is no mandate on the manufacturers to produce vehicles that comply with the Fleet Rules. The manufacturers may wish, as a business decision, to produce such vehicles in order to better compete in the local and specialized market of the specified fleet types (buses, street sweepers, airport shuttles, etc.) whose owners are covered by the Fleet Rules. However, as distinguished from the facts in *Cahill*, the manufacturers will be allowed

to offer their general production lines for sale in California without producing any vehicles that satisfy the Fleet Rules. Indeed, should all manufacturers independently decide[23] not to produce vehicles conforming to Fleet Rule requirements, then the Fleet Rules will be without effect, and fleet owners will be able to buy any California certified vehicle that they wish, pursuant to the "escape clause" in the Rules.

In Section 209(a), Congress was not concerned with restrictions on customers in their purchase of specialized product lines, but with mandates on vehicle manufacturers to produce more than two versions of any given line of vehicles. Although Section 177 does not limit Section 209, it indicates the intent of Congress, providing in pertinent part:

> Nothing in this section or in subchapter II of this chapter shall be construed as authorizing any such State [i.e., any non-California State that adopts California's emissions standards] to. . . . take any action of any kind to create, or have the effect of creating, a motor vehicle or motor vehicle engine different than a motor vehicle or motor vehicle engine certified in California under California standards (a "third vehicle") or otherwise create such a "third vehicle."

Lower courts have recognized this "identicality," or no "third vehicle," requirement as at the heart of Section 177. *Motor Vehicle Mfrs. v. NYS Dept. of Env. Cons.*, 17 F.3d 521, 531-32.

[23] We posit no mutual agreement among manufacturers to do so, since such an agreement would raise anti-trust concerns.



The legislative history of Section 209 also shows that Congress intended the Section 209 preemption to prevent manufacturers from being required to design and build more than two versions of each vehicle.[24] While Section 209 was under consideration, manufacturers demanded that they be required to make only one version of each model vehicle; California demanded that it be allowed to continue its long history of setting independent standards that would require a second, less polluting version. In Section 209, Congress struck the two-car compromise. California could adopt emissions standards that required manufacturers to make a second version of affected vehicles, while the federal version would be made for the other 49 States. The manufactures would not be required to build more than two versions of any vehicle. Congress then lifted the 49-State preemption after only a few years, allowing other States to adopt California's standards, but it required them to adopt California's standards in total, so that the two-car compromise was maintained.

The Fleet Rules in no way affect or threaten the two-vehicle compromise, because they do not require the production or sale of a third vehicle. The Fleet Rules not only do not require manufacturers to build and certify a third vehicle, they virtually forbid it, since they allow a covered fleet owner to choose solely from among California-certified vehicles. No third vehicle can be required,

[24] Respondents' briefs thoroughly cover the legislative history behind the origin of Section 209(a), and the balancing done by Congress of California's history and extreme vehicle air pollution problem against the burden on manufacturers of making more than one version of its cars and trucks. S. Rpt. No. 403, 90th Cong., 1st Sess., 155 (1967).

thereby respecting the purposes of Congress in enacting Section 209.

### F. Textual Analysis of the Act Shows That Congress Did Not Intend Section 209(a) to Preempt All State or Local Regulations Intended to Reduce Motor Vehicle Emissions.

Reading a statute to render a portion of it surplusage is disfavored under standard canons of statutory construction, since the terms of a statute should be read so as to give each of them meaning. *Moskal v. United States*, 498 U.S. 103, 109-110 (1990). Petitioners' reading of "standards relating to the control of emissions" would render surplusage several provisions of the Act that expressly *require* the States to carry out regulatory programs designed to lower vehicle emissions.

1. In the 1990 amendments to the Act, Congress recognized that the problem of urban air pollution is far more intractable than first supposed, and it enacted long and extraordinarily detailed provisions that States and localities are required to enact in nonattainment areas. 74 U.S.C. § 7502 *et seq.* Examples include transportation control measures to reduce vehicle miles traveled, including driving restrictions (42 U.S.C. §§ 7511a(c)(5); 7511a(d)(1)[25]), possible economic incentive programs (42 U.S.C. § 7511a(g)(4)), and the mandatory fleet rule provisions of Section 246, which require the use of clean-fuel

[25] In States having "extreme" ozone problems, even more severe transportation and traffic controls must be considered. 42 U.S.C. § 7511a(e)(4).



vehicles in specified fleets in ozone nonattainment areas. Petitioners' construction of the Act would render these provisions federally preempted. None of these provisions contains a clause stating that they apply "notwithstanding" Section 209(a), nor does Section 209(a) have such a *non obstante* clause as to them. To read the Act as both preempting and mandating the same regulations produces absurd results that Congress could not have intended. Such a reading should be avoided. *Public Citizen v. Department of Justice*, 491 U.S. 440, 453-455 (1988).

2. Congress has also stated that regulation of fuel quality affects vehicle emissions. S. Rpt. No. 101-228, 101st Con., 2d Sess., 1990, p.116; *Motor Vehicle Mfrs. v. NYS Dept. of Env. Cons.*, 17 F.3d 521, 532. Fuel quality affects emissions when a model goes through certification testing, and from the time a new vehicle is first fueled, even before it leaves the dealer's lot. Accordingly, the Act provides for controls on fuel content as a means of vehicle emissions control, including a provision for limited federal preemption of fuel content, in Section 211(c) of the Act. 42 U.S.C. § 7545(c). These controls, and the limited federal preemption, are entirely separate from the preemption in Section 209(a). *Motor Vehicle Mfrs.*, 17 F.3d at 532.

To read Section 209(a) as preempting all state or local regulatory measures that are intended to influence or reduce emissions would be to render nugatory the fuel content requirements of the Act in Section 211(c)(4). Section 211(c)(4)(A) forbids any "State (or political subdivision thereof) from setting fuel standards for purposes of motor vehicle emission control" if U.S. EPA has enacted or forbidden specified fuel content regulations itself. Section 211(c) allows that limited preemption, where it applies, to be waived for States other than California, Section

211(c)(4)(C), 42 U.S.C. § 7545(c)(4)(C), and exempts California from federal preemption altogether. 42 U.S.C. § 7545(c)(4)(B).

Although Section 211(c) expressly preempts state and local regulation of fuel and fuel additives for purposes of vehicle emissions control (where U.S. EPA has enacted the requisite fuel content prescriptions or proscriptions), it does *not* state that it applies "notwithstanding" Section 209. However, if the Section 209(a) preemption really covered *all* state or local regulatory measures intended to reduce or control vehicle emissions, there would be no need for Section 211(c)'s preemption of control of any fuels and fuel additives intended to reduce or control these same vehicle emissions; Section 209(a)'s supposedly blanket preemption would already have done so. The broad reading of Section 209(a) urged by petitioners and their *amici* would thus render the detailed provisions of Section 211(c)(4) surplusage.

Since neither Section states that it operates "notwithstanding" the other, Congress obviously intended both Sections to be given full effect.[26] Reading these two Sections of the Act together shows that Congress did not intend to preempt *all* state and local regulations that

[26] Congress *did* use the phrase "[n]otwithstanding Section [209(a)] of this title" in Section 177, when it lifted the federal preemption of Section 209(a) for States that adopt the California standards as their own. Where Congress believed that different sections of the Act overlapped, it was perfectly able to indicate which should trump the other. It did not say so in Section 211(c), showing that Congress itself did not consider the preemptive reach of Section 209(a) to be anything like the broad sweep claimed here by petitioners and their *amici*.



affect new motor vehicles and are intended to reduce emissions.

### G. The Act Does Not Preempt Controls on Vehicle Purchasers.

Petitioners believe that Section 209(a) can be read as preempting limitations on the buyers of vehicles, rather than preempting regulations that apply solely to the manufacturers. *Amici* States disagree. The Clean Air Act in Title II does not directly speak to controls on purchasers of vehicles, either positively or negatively. The text and legislative history of Section 209(a) are concerned with the competing interests of States and vehicle manufacturers, and do not directly address consumers. Petitioners can cite only one passing reference to purchaser of motor vehicles in the legislative history[27] and even that is ambiguous.

Congress has not spoken explicitly to regulations that target the demand side of vehicle emissions control, rather than the closely regulated supply side.[28] Certainly, Congress has not expressed a "clear and manifest" intent to preempt such programs. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715-716. Given this absence of congressional direction on purchaser controls, *amici* States believe that the *Rice* presumption

[27] Pet. Brf., at 38-39.

[28] The exception is the provision at Section 182(g)(4) of the Act, 42 U.S.C. § 7511a(g)(4), which allows States to elect to use an "economic incentives" program, which may include mobile sources, to meet certain emissions reduction targets. Again, Congress did not provide that States may pursue such programs "notwithstanding" Section 209, indicating that Congress did not view economic incentive programs as being preempted.

against preemption should control here, and the Fleet Rules upheld in the absence of any affirmative action by Congress to preempt such regulations.

## CONCLUSION

For all the reasons set forth above, *amici* States ask that the Court affirm the decision of the Ninth Circuit that the Fleet Rules are not federally preempted.

Dated: November 17, 2003

Respectfully submitted,

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No. 02-1343

Supreme Court, U.S.
FILED
NOV 17 2003
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

ENGINE MANUFACTURERS ASSOCIATION
AND WESTERN STATES PETROLEUM ASSOCIATION,

*Petitioners,*

vs.

SOUTH COAST AIR QUALITY
MANAGEMENT DISTRICT, et al.,

*Respondents.*

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

## BRIEF OF *AMICUS CURIAE* SUNLINE TRANSIT AGENCY IN SUPPORT OF RESPONDENTS

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67 pp

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## INTEREST OF *AMICUS CURIAE*

SunLine Transit Agency ("SunLine") is a California joint powers authority organized and existing pursuant to California Government Code §6250 et seq. and composed of the California cities of Desert Hot Springs, Palm Springs, Cathedral City, Rancho Mirage, Palm Desert, Indian Wells, La Quinta, Indio, Coachella and the County of Riverside. SunLine is a fleet owner and operator as well as a world renowned leader in the development and application of alternative fuel technologies. SunLine advocated for the adoption of the Fleet Rules by the South Coast Air Quality Management District that are challenged in this case and files its brief in accordance with Supreme Court Rule 37.3.[1]

## STATEMENT OF THE CASE

SunLine Transit Agency ("SunLine") submits this *amicus curiae* brief in support of Respondents, the South Coast Air Quality Management District ("SCAQMD" or "South Coast"), et al., and Natural Resources Defense Council, et al. (collectively referred to as "Respondent") and in defense of the district court decision which upheld the Fleet Rules adopted by SCAQMD against various preemption challenges. *Engine Mfrs. Ass'n v. SCAQMD*, 158 F. Supp. 2d 1107 (C.D. Cal. 2001) and as affirmed by the

[1] The parties have consented to the filing of this brief. This brief was not authored in any part by counsel for any party, and no persons or entities other than *Amicus Curiae* or its counsel have made a monetary contribution toward the preparation or submission of this brief.

Ninth Circuit Court of Appeals in *Engine Mfrs. Ass'n v. SCAQMD*, 309 F.3d 550 (2002). SunLine adopts the Statement of the Case submitted by Respondent with the addition of the following background considerations and urges affirmance of the decisions below.

SunLine has experience that is significant to this case. SunLine was a vocal supporter of the adoption of the Fleet Rules by South Coast and participated throughout the rule making process in expression of its position. SunLine's service area is well known as a haven for recreational activities, sporting some 200 golf courses and serving as the venue for one of the "Masters Series" tennis tournaments held at the Indian Wells Tennis Garden. The Coachella Valley in which SunLine operates is nearly surrounded by high mountain ranges whose geographic and environmental features have the potential to "re-create" the air quality problems experienced by the Los Angeles basin as the population in the area grows. Clean, healthful air is a prime attractant for the tourist industry that fuels much of the economy in SunLine's territory. Long before the adoption of the Fleet Rules at issue in this case, leaders in the Coachella Valley were concerned about preservation of the area's air quality. With the aspiration in mind to prevent degradation of its air resource, in 1993, SunLine's board of directors adopted a policy which required the agency to purchase only alternatively fueled vehicles for both revenue and non-revenue purposes. In 1994 SunLine became the first public transit agency in the United States to become 100% alternatively fueled through its purchase of compressed natural gas ("CNG") buses and related support vehicles. SunLine currently operates a total of 54 alternative fueled buses which tally a total of 4 million miles per year in fixed route operations.



Of the total 54 alternative fueled buses operated regularly by SunLine, 47 are CNG powered, 2 run on Hythane®, 2 are electric powered and 3 are operated using liquified natural gas (LNG). The 54 heavy-duty transit buses are only a portion of the full SunLine fleet. In addition to its buses, SunLine operates 25 CNG powered vans used in its paratransit service. These vans, ranging from 7 to 14 passenger size (plus wheel chair lifts & ADA equipment) drive in excess of 875,000 annual miles. Also in the fleet are 40 support and specialty vehicles ranging from passenger cars to heavy-duty trucks. These vehicles operate an additional 662,000 annual miles.

Since its initial commitment to alternative fueled vehicles and programs, SunLine has grown to become a recognized global expert in the alternative fuel movement, having been invited to make presentations in many foreign countries, including Taiwan, Canada, Germany and Chile, to name a few, concerning the operational, economic and practical aspects of CNG fleet operations. Due in large part to SunLine's innovation, what once was viewed as a new relatively untested technology in CNG fleet operations, has now proven to be a time tested, reliable and cost effective manner of operating a fleet.

SunLine is also a leader in the research and development of other clean fuel technologies for commercial application and is a pioneer in research and development related to the use of hydrogen as a fuel. Due to the inexhaustible source of clean burning hydrogen, this technology promises a likely next step in the fight against air pollution. SunLine is utilizing Hythane® fuel in two different applications designed for commercial use. Hythane® combines a mixture of 20% hydrogen with 80% CNG to further reduce emissions already achieved by

CNG alone by 43%. In the near term, Hythane® has been used by SunLine to power a more conventional modified engine in commercial transit application and achieves significant air quality benefits from reduced emissions. (See the Cummins Westport, et al., Report entitled "Upgraded B Gas Plus Engine for Operation with Hydrogen Blended Natural Gas Fuel" attached as Appendix, pp. 1 through 6).

In the long term, another new and promising technology uses Hythane® with fuel cells in a commercial application, another arena in which SunLine is a pioneer. Not only is SunLine a founding member of the World Wide Fuel Cell Transit Consortium, it also became the first transit agency to operate a hybrid fuel cell bus in transit revenue service in a project sponsored by the U.S. Department of Energy through its National Renewable Energy Laboratory, the SCAQMD and others.[2] SunLine is also in the process of acquiring one of four prototype transit buses intended to be powered by a fuel cell specially designed for this purpose. All of SunLine's efforts are devoted to the primary goal that it shares with the Clean Air Act; that of achieving and preserving the air quality in its region. SunLine's hope is that its work in the development of alternative technologies advances the use of cleaner technology by others to achieve the same purpose.

SunLine responds to the joint *amicus curiae* brief of the American Automotive Leasing Association and National

[2] A copy of the DOE Hydrogen Fuel Cell & Infrastructure Technologies Program Report on SunLine's hydrogen bus demonstration project is attached as Appendix, pp. 7 through 12.



Association of Fleet Administrators Inc., (collectively referenced here as "AALA"). AALA makes several factual claims in support of its legal argument to the effect that the Fleet Rules are pre-empted by Section 246 of the Clean Air Act which AALA characterizes as part of a federal policy that established a limited, uniform series of fleet regulations. AALA's policy arguments are founded upon fears and speculative barriers that are inconsistent with the actual operational experience of SunLine as a fleet operator and with the goals of the Clean Air Act as a whole.

AALA asserts that several unique attributes of fleets were meant to be addressed by Congress in its adoption of the clean-fuel fleet program ("CFFP") which Amicus characterizes as a uniform federal scheme for fleet regulation. According to AALA, requirements of the Fleet Rules adopted by the South Coast Air Quality Management District discourage and frustrate the environmental benefits already generated by fleet operations. (See AALA, p. 5-6). AALA contends that this is so because the industry already provides "tangible air quality benefits" due to improved fleet maintenance and the fact that vehicles are selected to be "right sized" such that they do not unnecessarily consume pollution generating fuels. (See AALA, p. 5). Operational difficulties are feared by AALA in the industry's potential exposure to varying fleet requirements among different jurisdictions in which they operate and they assert that they face increased costs associated in their compliance with the Fleet Rules and the restrictive

choices given them to choose among "right sized" compliant vehicles.[3]

AALA's arguments are unpersuasive when they are considered in the context of the entirety of the Clean Air Act, the amendments of which the CFFP is a part, and with the Fleet Rules themselves. There is no support for the proposition that Congress intended for Section 246 of the Clean Air Act to occupy the field of fleet regulation or to provide an exclusionary uniform federal scheme for the regulation of fleets. The fact that Congress adopted Section 246 in the first instance undermines AALA's premise that fleets already contribute their "fair share" of emissions benefits over and above that of the "general population" such that they should remain essentially self regulated. If such were the case, Section 246 would not have been offered by Congress as an optional method for nonattainment area States to adopt as a method to lower emissions.

AALA's claim that the CFFP was intended to provide a uniform system of regulation designed to protect fleets from varying State standards is also misplaced. If this were truly the purported Congressional purpose in adopting Section 246, it would have more plainly signaled that

[3] AALA's fears about limited choice in the available vehicles that are of an appropriate size to meet varying fleet needs are unfounded as demonstrated by the growing number and variety of alternatively fueled vehicles offered on the market. (See for instance, the wide range of CNG powered light, medium and heavy-duty vehicles in many different sizes and configurations that are manufactured by well recognized producers such as Ford, GMC, Orion and Thomas among others at the website of the California Natural Gas Vehicle Coalition, www.cngvc.org).



intent. The fact that Congress has adopted fleet requirements in other areas which differ from the CFFP stands in contrast to AALA's uniformity argument. Although certain features that address the practical aspects of fleet operation were logically included in the development of the language of Section 246, such considerations should not be read out of context or be extended to the level of an overriding Congressional mandate that undercuts the balance of the Clean Air Act and the dual regulatory system that forms its framework. Rather, the CFFP should be construed as consistent with the broader goals of the Clean Air Act to protect the public health from increasing risks associated with air pollution in nonattainment areas.

One of the inherent difficulties in the administration of the Clean Air Act ("CAA") is the basic fact that the occurrence and levels of air pollution are not "uniform" or restricted to certain State or local boundaries, a fact recognized as the starting point for Congress having established its dual federal/state regulatory system which affords the States and their political subdivisions wide latitude to regulate aspects of air quality under Sections 101 (42 U.S.C. §7401) and 116 (42 U.S.C. §7416). Congress did not choose to include the provisions of Section 246, or others of the CFFP in its list of federally regulated subjects where it has chosen to pre-empt the field and to provide for a single uniform regulation of the subject matter. In light of these considerations, AALA's arguments for field and conflict pre-emption of the Fleet Rules by Section 246 should be rejected.

## I. IN THE EXPERIENCE OF SUNLINE, OPERATION OF LOW EMISSION AND ALTERNATIVELY FUELED FLEETS IS NOT MORE BURDENSOME THAN OPERATION OF TRADITIONALLY FUELED FLEETS.

In addition to its more recent research activities, SunLine, along with the Sacramento Regional Transit District (another CNG fleet operator), participated in a study entitled "Three Year Comparison of Natural Gas and Diesel Transit Buses" ("Three Year Study").[4] The Three Year Study found that CNG alternative fuel vehicles provide far better savings in terms of maintenance than their dirtier diesel counterparts. SunLine achieved a 27 percent reduction in maintenance costs compared to a diesel fleet and Sacramento Regional Transit achieved a 38 percent savings. (The comparison figures are to older diesel buses in the Sacramento fleet, a factor recognized by the study and accounted for in its findings.) The Three Year Study also documented the savings in terms of fuel cost achieved by both transit agencies in their use of clean burning compressed natural gas. Not documented, was the cost savings in terms of human health benefits that both transit agencies produced in their reduction of harmful air emissions in the regions in which they each operate.[5]

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[4] The Three Year Study is attached as Appendix, pp. 13 through 36.

[5] The Three Year Study was based upon actual operations by two diverse transit agencies utilizing the technology in service under differing conditions in contrast to the assertion by Amici Curiae, Alliance of Automobile Manufacturers, et al., to the effect that one transit official *anticipated* that future operations of advanced diesel

(Continued on following page)



AALA has pointed to the contribution of its members to the air pollution problems faced by many jurisdictions in that its members arguably use "right sized" vehicles to meet the varying demands of their operations, implying that the choice of vehicles covered by the Fleet Rules is limited. Any such claim is not factually supportable. There is no lack of variety in available models of low-emitting or alternatively fueled vehicles. In the transit bus arena alone, more than 19 available models from major industry suppliers are listed in the California Natural Gas Vehicle website (www.cngv.org). In addition to public transit service with alternative fuel buses, SunLine also serves other municipal functions for its member cities which includes street sweeping operations that rely solely upon alternative fueled vehicles. All of the street sweeping vehicles, water trucks, pick up trucks, dump trucks and support vehicles were readily available on the open market for SunLine's purchase and use. Another governmental duty SunLine provides is that of regulating taxicabs for the valley cities, and SunLine recently assisted the taxi and limousine industry to purchase 50 alternative fuel vehicles that range from passenger sedans to passenger vans that are used in the transport of the public to and from local airports and other destinations. As demonstrated by the California Natural Gas Vehicle Coalition web site listings, a wide variety of alternative fueled vehicles in differing sizes and specifications are therefore presently available with more choices slated for the future.

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vehicles would be the "most cost effective way to reduce emissions." (See brief of Alliance of Automobile Manufacturers, et al., p. 22, fn. 28).

## II. THE COURT SHOULD REJECT AMICI'S ARGUMENT THAT SECTION 246 OF THE ACT PRE-EMPTS THE FLEET RULES.

The amicus brief of AALA asserts that the federal clean-fuel fleet program ("CFFP") set forth in Section 246 of the Clean Air Act (42 U.S.C. §7586) pre-empts the Fleet Rules. AALA argues that Congress has pre-empted the field of fleet regulation by adopting the CFFP even though Section 246 is not included in the list of pre-empted subjects. Since it is not so included, AALA must fashion its argument upon implications of pre-emption which invite an "extravagant mode of interpretation" rejected on more than one occasion by this court (see for example *Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas*, 489 U.S. 493 (1989).

The Clean Air Act is well recognized as one of the most comprehensive pieces of legislation adopted by Congress which is designed to achieve and maintain air quality standards by, among other things, imposing standards for air quality to be achieved by the States and their political subdivisions. Congress did not, on the one hand impose mandates without also preserving to the States the regulatory tools needed to realize the public health and safety goals inherent in the Clean Air Act. The proposition that Congress intended to preserve the authority of the States to regulate fleets is reflected first and foremost, by the fact that Section 246 is not included in the Section 116 list of Clean Air Act provisions intended to be pre-empted. *See* 42 U.S.C. §7416 (listing exceptions to the "savings clause" of the Clean Air Act). This omission is crucial and should be the paramount consideration in evaluating the viability of the Fleet Rules, in the context of the dual regulatory structure of the Clean Air Act. This is a case where caution



should be used to "avoid encroachment" into the areas that Congress intended to be reserved to the States. *Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas*, 489 U.S. 493 (1989).

Nor is the presumptive hurdle created by the omission of Section 246 from Section 116 overcome by AALA's implied pre-emption argument primarily because a State may elect to opt-out of the clean fleet provisions of Section 246 either in whole or in part. In addition, both Congress and EPA have either adopted differing fleet requirements in other regulatory contexts or have recognized that the States and their subdivisions may do so. The fleet regulations of the CFFP cannot be said then, to be "so pervasive" or to "touch upon a field" of federally intended dominance sufficient to support an implied pre-emption argument. *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141 (1982)

Finally, SCAQMD's Fleet Rules do not conflict with any federal policy under the Clean Air Act designed to establish uniformity in the regulation of fleets that operate in multiple jurisdictions. Even if such a purpose were to be artificially grafted into the CFFP, specific exemptions included in the Fleet Rules operate to alleviate any burdensome compliance requirements.

### A. Section 246 Is an Optional Program for Improving Air Quality in Nonattainment Areas.

The CFFP and Section 246 originated in the 1990 Amendments to the Clean Air Act and concern improvements to air quality in designated nonattainment areas. *See* Pub. L. No. 101-549, 104 Stat. 2399 §299 (1990)

(codified at 42 U.S.C. §7586). The emissions reductions required pursuant to Section 246 and the CFFP apply only to States with ozone or carbon monoxide nonattainment areas. Under the 1990 Amendments, each State that contains a covered nonattainment area must submit to EPA a revision of its state implementation plan ("SIP") adopting either the federal CFFP or a substitute program, approved by EPA, that produces an equivalent or greater reduction of pollution. *See* 42 U.S.C. §7511a(c)(4). The CFFP, which is a program requiring fleet operators to include specified percentages of clean-fuel vehicles in their fleets by given target dates (*see* 42 U.S.C. §7586(a)), is an optional ready-made federal model that States may use as one of many tools to achieve air quality improvements in the nonattainment areas. In sum, States can adopt the CFFP or find another way to achieve the same reductions. The CFFP does not dictate to the States a rigid set of rules for imposing clean-fuel vehicle purchase requirements on fleet operators, but rather, supplies a model program for achieving air quality improvements. The 1990 Amendments reflect that Congress continued to allow States the same traditional flexibility that formed the initial basis for the CAA in achieving the emissions reductions.

### B. The CFFP Does Not "Occupy the Field" of Clean-Fuel Vehicle Purchase Requirements.

AALA's argument, that the CFFP occupies the field of fleet purchase regulation, faces a significant hurdle in establishing evidence of clear Congressional intent to pre-empt state regulation in this area. In order to support an inference of field pre-emption, the scheme of federal regulation must "touch a field in which the federal interest is so dominant that the federal system will be assumed to



preclude enforcement of state laws on the same subject" and must be "'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The full context of the Clean Air Act of which the CFFP is only a part, does not justify such an inference of pre-emptive intent.

If traditionally the federal government has not been active in the relevant regulatory field, Congress must be especially clear in its intent to pre-empt the subject matter. "Where the field that Congress is said to have pre-empted has been traditionally occupied by the States, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 722, 723 (1985) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The lower federal courts have found air pollution control to be a regulatory area traditionally dominated by the States and thus have required evidence of clear Congressional intent to pre-empt such State efforts. *See Exxon Mobil Corp. v. U.S. EPA*, 217 F.3d 1246, 1255 (9th Cir. 2000) (Air pollution prevention falls under the broad police powers of the States, which include the power to protect the health of citizens in the State); *Envt'l Encapsulating Corp. v. New York*, 855 F.2d 48, 53-54 (2d Cir. 1988) (finding that the State asbestos program at issue "unmistakably involves an exercise of a State's police powers").

This principle has particular effect where, as in the case of the CAA, Congress has developed a long standing

dual regulatory role between itself and the States – including the political subdivisions of the States such as Respondent. (See *Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas*, 489 U.S. 493 (1989), and *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991)). Congressional intent, as derived primarily from the face of the language and structure of the statute itself, is the starting point for review. "In analyzing whether Kansas entered a pre-empted field, we must take seriously the lines Congress drew in establishing a dual regulatory system, and we conclude that paragraph (p) is a regulation of 'production or gathering' within Kansas' power under the NGA." *Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas*, 489 U.S. 493, 513 (1989). The lines of demarcation drawn by Congress for purposes of pre-emption are expressly drawn in the CAA in several places.

First, under Section 116 (42 U.S.C. §7416) of the CAA Congress has specifically listed those provisions that it intends to have pre-emptive effect in its dual regulatory system under Section 101 (42 U.S.C. §7401).[6] The fact that Congress omitted Section 246 from its well recognized list of pre-emptive provisions provides strong evidence that it had no intent to afford such an effect to the CFFP. Secondly, Section 246 must be read in the context of the findings and purpose of the Clean Air Act as a whole, and

[6] The listed pre-emptive Sections only include (in addition to designated Sections of the Act effective before 1977), Section 209 (pre-emption of state standards relating to the control of emissions from new motor vehicles or new motor vehicle engines), Section 211(c)(4) (regulation of fuels and fuel additives), and Section 233 (standards respecting emissions from aircraft or aircraft engines).



should not be evaluated in isolation as is the case with AALA's argument. On the one hand, EPA has established certain national ambient air quality standards ("NAAQS) to be met by the States as directed by Congress in Section 108 (42 U.S.C. §7408). The power required for States to meet the NAAQS is expressly reserved to them under Section 116 (42 U.S.C. §7416) and is a critically required feature for their achievement of the public health goals sought to be advanced by the Clean Air Act. AALA's argument invites the same sort of "extravagant interpretation" rejected in *Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas*, 489 U.S. 493 (1989) where the State was specifically reserved authority over certain aspects of gas production but, it was argued, could not enforce its regulations. It has long since been resolved under the CAA that the dual regulatory system of that statute not only permits, but dictates that States and their political subdivisions develop measures designed to achieve the air quality standards imposed by the statute. *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975) "So long as the ultimate effect of a State's choice of emission limitations is in compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation" subject only to the limitations expressed on the face of the statute itself. *Id.* at p. 746. Similarly, here, "it would be strange indeed" to hold that Congress imposed a mandate upon the States to achieve ambient air quality standards established by the EPA yet deprived them of the means in which to comply with the statutory directive.

Nor is the fact that the Fleet Rules were adopted by South Coast rather than by the California Air Resources

Board or the California Legislature of any importance to a pre-emption analysis. The California Air Resources Board is not the only political subdivision within the State of California empowered to regulate air quality. The SCAQMD is specifically authorized by California Health and Safety Code Section 40447.5 to adopt fleet rules thereby reflecting, at the State legislative level, a choice that Respondent's contribution to "the mix" of regulations to clean the air could specifically include the adoption of rules regulating fleets.

In the case of power under the Clean Air Act, the authority of the States and their political subdivision is expressed in Section 101 (42 U.S.C. §7401) which delineates Congressional findings to the effect "(a)(3) that air pollution prevention (that is, the reduction or elimination, through any measures of the amount of pollutants produced or created at the source) and air *pollution control at its primary source is the primary responsibility of States and local governments*" (Emphasis added). In terms of its declaration of purposes, Section 101 includes "Pollution prevention" as a primary purpose and recites as its goal "to encourage or otherwise promote reasonable Federal, State and local governmental actions, consistent with the provisions of this Act, for pollution prevention." (see 42 U.S.C. §7401(c)). These Congressional statements of intent expressly acknowledge the important role played by States and their political subdivisions in achieving the goals of the statute.

The structure of the 1990 Amendments enacting Section 246 and the CFFP also indicate that Congress did not intend to occupy the field of fleet purchase regulations. The concern of Congress in enacting the CFFP was with achieving emissions reductions, not with regulating fleets.



The lone decisive factor governing EPA's approval of a Section 246 substitute program is whether or not the program is designed to achieve emissions reductions equivalent or superior to those contemplated by the CFFP. EPA must approve a SIP revision implementing a State substitute program if the program "will achieve long-term reductions in ozone-producing and toxic air emissions equal to those achieved under [the Act's clean-fuel vehicle program], or the percentage thereof attributable to the portion of the clean-fuel vehicle program for which the revision is to substitute." 42 U.S.C. §7511a(c)(4)(B). This language is unambiguous in its restriction of EPA's discretion to a consideration of a single variable: emissions reduction. *See* 42 U.S.C. §7511a(c)(4)(B) (EPA "*shall* approve . . . any revision" that produces equivalent reductions) (Emphasis added). So long as the substitute program promises equivalent emissions reductions, its other features are essentially irrelevant, including whether the program incorporates any particular provision of the CFFP. This feature provides further support that Congress did not deviate from or "supplement" its goals to pursue uniform fleet regulation as a purpose under the CAA when it adopted Section 246.

For evidence of Congressional intent to limit the discretion of the States to regulate fleets, AALA also points to provisions in Section 246 such as the requirement that the program be "vehicle- and fuel-neutral." (*See* AALA, et al., at p. 14). Since States may "opt-out" of the CFFP by implementing a substitute program that lacks vehicle- and fuel-neutral provisions altogether, particular provisions of the CFFP cannot be read to reflect a Congressional intent to limit the wide latitude otherwise granted the States and their political subdivisions to regulate in the field. EPA's

approval of California's LEV program as a substitute for the CFFP illustrates the broad leeway States have in opting out of the CFFP. *See* 64 Fed. Reg. 46,849 (1999) (California submitted and EPA approved, California's Low Emission Vehicle ("LEV") Program as a replacement for the CFFP). The LEV Program is California's regulatory program setting standards and certification requirements for new light- and medium-duty motor vehicles pursuant to Section 209(b), 42 U.S.C. §7543(b), of the Clean Air Act. The LEV Program consists primarily of tailpipe emission standards and production requirements for light-duty and medium-duty motor vehicles. No aspect of the LEV program regulates or concerns fleets or fleet purchase requirements. In approving the substitution of the LEV Program for the CFFP, EPA, in conformance with the directive of Congress, recognized that the substitution would commit California to achieve "long-term reductions in ozone and toxic air contaminants . . . provided by the [CFFP]." 64 Fed. Reg. 46,849 (1999).

The fact that all provisions in Section 246 may be disposed of by States, if they design a different program to achieve Section 246 reductions, undercuts AALA's assertion that "fuel-neutral" and other provisions of Section 246 are intended to occupy the field. The "character of obligation imposed" by the CFFP – i.e., a reduction in ozone and toxic air contaminants – does not suggest that Congress wanted fleets regulated in a particular, federally-stipulated fashion. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The CFFP would not be a "pervasive" regulatory scheme that would occupy the field even if it were mandatory, and it certainly does not occupy the field where compliance with the scheme is wholly optional.



### C. The Fleet Rules Are Not Inconsistent With And Thereby Pre-empted by Section 246 Under "Conflict Pre-emption" Principles.

AALA also argues that the Fleet Rules are inconsistent with Section 246 and therefore pre-empted by principles of conflict pre-emption. Conflict pre-emption may exist where "'under the circumstances of the particular case'" the state or local requirement "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (*Geier v. American Honda Motor Company, Inc.*, 529 U.S. 861, 873 (2000) citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)

Where, as here, there is a dual regulatory role established in the statute, any conflict pre-emption analysis "must be applied sensitively . . . so as to prevent the diminution of the role Congress reserved to the States, while at the same time preserving the federal role." *Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas*, 489 U.S. 493, 531 (1989). The fact that some impact or effect upon an area within the federally established side of the equation is created by the local regulation does not "trigger" a finding of a conflict because inevitably, "jurisdictional tensions" are inherent in any dual regulatory system. *Id.* at p. 515.

The conflict pre-emption argument of AALA fails for the reasons outlined above: nothing in the text, structure, or legislative history of the Clean Air Act demonstrates a Congressional intent to establish uniform fleet purchase requirements, and the States' ability to supplant the federal CFFP with their own programs fatally undermines such a view of Section 246. The only uniformity sought by Congress in enacting the CFFP was to compel States with designated nonattainment areas to take further affirmative

action to achieve emissions reductions – either through the CFFP or by otherwise intensifying their regulatory efforts to achieve emissions reductions.

### 1. There is no support for AALA's argument that there is a federal policy of uniformity with respect to fleet purchase requirements.

In support of its assertion that there is a federal policy of uniformity with respect to fleet purchase requirements, AALA cites EPA's notice of proposed rule making ("NPRM") for the CFFP. (*See* AALA at p. 4, 14, and 28 (citing 58 Fed. Reg. 32,474 (1993)). Contrary to this assertion, the NPRM makes no mention of a congressional purpose and provides no evidence of a federal policy of uniformity. *See* 58 Fed. Reg. 32,474 (1993) (The NPRM's only discussion of uniformity is its summary of comments received from AALA et. al.'s constituents: "The industry strongly requested that a patchwork set of state programs be avoided. The industry stated that this would assist their implementation, reduce their costs, and improve overall program effectiveness. . . . As a result, the members of the fleet industry requested regulations to ensure that states would enact similar programs.")[7]

The fact that Congress and EPA have adopted, or recognized, non-uniform fleet regulations in these other

[7] Moreover, the rules adopted by EPA apply only to States that choose to adopt the federal CFFP, not to those that go their own way. Whatever uniformity is promised by EPA's rules, then, can be undercut by States' adopting nonconforming substitute programs.



contexts speaks volumes. For example, the Energy Policy Act ("EPACT"), imposes fleet requirements that are not "fuel neutral" and differs from the "fuel neutral" provisions of the CFFP, upon which AALA relies to support its argument. EPACT requires federal and state fleets to use vehicles operating on "alternative fuels" which include natural gas, methanol, ethanol, electricity, and other fuels that are "substantially not petroleum."[8] *See* 42 U.S.C. §13211(2). Thus, Congressional enactments affecting fleet operators are themselves not uniform in their requirements.

In other contexts, EPA has recognized that existing state and local clean fuel fleet programs differ from the CFFP and has never indicated any intent to pre-empt such programs. *See e.g.,* 56 Fed. Reg. 50196, 50198 (1991) (Preamble, Clean Fuel Fleet Credit Programs) ("In addition to the clean fuel fleet program required by the Clean Air Act, there are a number of other programs being implemented or considered at national, state or local levels, which involve the introduction of clean fuel vehicles in fleets. There is expected to be some overlap between the requirements for vehicles in these programs and those for vehicles in the CAA fleet program.") EPA has not referenced any intent by Congress or by the agency to establish a set of national, overriding standards to regulate fleets. EPA's statements in the preamble to the Clean Fuel Fleet

[8] While EPACT alternative fuel requirements apply to light and some medium-duty fleets, not heavy-duty fleets, 42 U.S.C. §13211(9), the law nevertheless demonstrates a Congressional purpose to support the development and deployment of alternative fuel vehicles and non-uniformity with respect to designation of fuel types in programs regulating fleets.

Credit Programs is "dispositive on the question of an implicit intent to pre-empt" unless it clearly conflicts with Congressional intent. *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 714 (1985). AALA has failed to make a showing of "implicit pre-emption of the whole field, or of a conflict between a particular local provision and the federal scheme that is strong enough to overcome the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation." *Id.* at p. 723. A finding that the CFFP occupies the field of fleet regulation would contradict EPA's statements in the Clean Fuel Fleet Credit program and invalidate portions of EPACT.

**2. The Fleet Rules do not interfere with any purported objective of a policy of uniformity, even if such a federal policy or Congressional intent could be implied from the CFFP.**

AALA argues that the Fleet Rules are pre-empted by Section 246 because they stand as an "obstacle" to the Congressional purpose of the CFFP which is to regulate fleets in a uniform manner. (See AALA pp. 28-29). AALA cites *Geier v. American Honda Motor Company, Inc.*, 529 U.S. 861, 873 (2000) in support of its position. The analysis of the statutory structure under the *Geier* case is distinguishable for several reasons. First, *Geier* considered the continued viability of a state tort claim premised upon a specific standard that was the concurrent subject of an *express* pre-emption provision of the National Traffic and Motor Vehicle Safety Act. The CFFP was not similarly elevated by Congress to be included in either Section 209 or Section 116 of the CAA.



The opinion in *Geier* also made clear that the conflict pre-emption analysis is fact specific and does not exist unless "under the circumstances of the particular case" the state or local law is an "obstacle" to the purposes and objectives of Congress. *See Geier*, supra, 529 U.S. at 873. On the facts of this case, the Fleet Rules simply do not interfere with any purported objective of requiring uniformity in order to protect fleet operators operating in multiple states. The Fleet Rules are designed to address operators' concerns regarding operation outside the boundaries of the District and contain exemptions that apply to fleets which include vehicles operating in more than one jurisdiction or geographic area.[9] Each of the District's Fleet Rules contains a provision allowing exemptions where a compliant vehicle is not available or suitable for use. (Rule 1191(f)(8), Rule 1192(e)(2), Rule 1193(e)(3), Rule 1194(e)(2), Rule 1186.1(e)(1)(C), and Rule 1196(e)(1)(C)).

AALA's argument is founded on a faulty premise that the purpose and objective of Congress in adopting the

[9] Rule 1192, pertaining to transit bus fleets, contains an exemption for buses used for long-distance, out-of-District trips. Rule 1192(e)(1)(B). Rule 1194, pertaining to commercial airport ground access vehicles, such as shuttles and taxis, likewise exempts vehicles providing long-distance, out-of-District service. Rule 1194(e)(1). Similarly, Rule 1196 contains an exemption for heavy-duty vehicles used routinely to transport materials in and out of the District. Rule 1196(f)(6). Rule 1196, which applies to public agency heavy-duty fleets not covered by the more specific rules and to fleets whose jurisdictions extend beyond the boundaries of the District, contains an additional exemption for vehicles garaged or used within the District for less than 180 days in a year. Rule 1196(f). There is no need for such an exemption for light-duty passenger vehicles, or for medium-duty vehicles, since the majority of models of these vehicles available in California comply with the fleet rules running on gasoline.

CFFP was to promote uniformity in the regulation of fleets when, in fact, the Congressional purpose was to promote the attainment of clean air. In *Geier,* this court found, after reference to extensive administrative proceedings, that the statutory purpose was to provide manufacturers with a "mix" of options to implement federally mandated passive restraint systems in motor vehicles. By contrast, under the CAA, the discretion allowed by the statute rests not with the fleet industry, but rather with the States to develop the "mix" of regulations they require to achieve the federally mandated air quality standards imposed upon them. The CFFP is one of a myriad of available options within the limits of the State's authority under Section 209. Finally, unlike the court's discussion in *Geier,* the Clean Air Act's legislative history offers nothing to compensate for the lack of evidence of pre-emptive intent in the statutory text or structure. Nothing in the legislative history of the 1990 Amendments (enacting Section 246), including the committee reports or floor debates, even implicitly suggests that Congress intended the CFFP was intended to displace all state action in the area.

Finally, in *Geier,* a majority of this court expressly rejected the dissent's position that a "special burden" was placed upon the party claiming pre-emption where there was either a savings clause and a pre-emption provision (or both) and that ordinary conflict pre-emption provisions were to apply. *Id.* at pp. 870, 871. SunLine believes that the legislative structure of the Clean Air Act distinguishes it from the statute at issue in the *Geier* case and urges the court to consider some form of analysis (by whatever name) that creates a strong presumption against a finding of implied field or conflict pre-emption within the context of a dual regulatory structure, particularly where it is



coupled with a mandate such as that of Section 110 (42 U.S.C. §7410(a)(1)). Unlike the provisions of the National Traffic and Motor Vehicle Safety Act at issue in *Geier*, the Clean Air Act is first and foremost a mandate to the States, directing that they achieve certain levels of air quality in a timely fashion. When this statutory mandate is coupled with the savings clause of Section 116 (42 U.S.C. §7416), the explicit pre-emption provision of Section 209 (42 U.S.C. §7543), and the findings and purposes set forth in Section 101 (42 U.S.C §7401), some additional burden or presumption against implied pre-emption would be logically justified.

In the circumstances of this particular case, AALA cannot carry its burden of proving that the Fleet Rules interfere with the purposes of any Congressional intent for regulation of fleets uniformity, even if such intent could be implied from the CFFP program.

## CONCLUSION

If States and local governments are to make progress in the field of air pollution control as mandated by Congress under the Clean Air Act, their tools for achieving its purposes must be preserved. Judicial restraint and caution has directed the past course of review where arguments for implied field and conflict pre-emption have been advanced. This is particularly true where the statute at issue structures a dual regulatory role between the federal government and the states. No indicia of Congressional intent to pre-empt State authority can be tied to Section 246. For the foregoing reasons, SunLine supports the South Coast Air Quality Management District in its

defense of the district court's opinion and urge this court to affirm that decision.

Respectfully submitted,

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Cummins Westport SunLine Westport INNOVATIONS INC.

**Upgraded B Gas Plus Engine for Operation with Hydrogen Blended Natural Gas Fuel**
***•Overview and Summary Results•***

▸ ***Introduction***

With funding from the U.S. Department of Energy through NREL and SCAQMD, SunLine Transit Agency initiated a project to demonstrate two buses operating on a mixture of natural gas and hydrogen (HCNG or Hythane®). SunLine asked Cummins Westport Inc. (CWI) to upgrade the CWI B Gas Plus engine rated at 230 horsepower. The work was done by Westport Innovations Inc., a parent company of CWI. Hydrogen Components Inc. of Littleton, Colorado, which led the previous Hythane® engine tests, is an advisory member of the current project team.

Previous investigations have shown that the presence of hydrogen in the natural gas enabled leaner (air/fuel) mixtures to be used, leading to reduced nitrogen oxides (NOx) emissions.

▸ ***Objectives***

The objectives of the engine upgrade portion of the project were to:

- determine if significant NOx reductions could still be achieved on modern engines operating closer to the lean (air/fuel) limit;
- determine the most suitable hydrogen content in the range of 15% to 30% by volume for the B Gas Plus engine, with the constraint of retaining the engine performance and efficiency;

- configure engine controls for operation on the chosen mixture; and
- calculate the overall emissions benefits.

### *Engine*

The HCNG upgrade was developed for the CWI B Gas Plus – an in-line 6 cylinder, electronically controlled and turbocharged lean burn spark-ignited engine. The engine has a displacement of 5.9 liters and is certified at NOx+non-methane hydrocarbons (nmHC) levels of 1.8 g/bhp-hr and particulate matter (PM) of 0.01 g/bhp-hr when fitted with the standard oxidation catalyst.

Hardware modifications were limited to the fuel flow rate sensor. All other components remained unchanged.

### *Method*

Natural gas and hydrogen blends were prepared and stored in a high-pressure storage vessel.

The fuel mixture was fed to a B Gas Plus engine that was mounted on a dynamometer. The engine was operated under steady-state conditions at four selected speeds and loads. At these operating points, engine combustion was optimized over a defined matrix for hydrogen fractions between 20 and 32%.

A 20% hydrogen content by volume was found to provide the most cost effective benefits when taking into consideration the engine and vehicle performance attributes. Range consideration was also taken into account – for example, a 20% hydrogen mixture reduces the range of a vehicle by approximately 15%, unless more storage vessels or higher-pressure vessels are used. A 20% hydrogen



mixture contains 3% hydrogen by mass and 7% hydrogen by energy.

A full engine map was developed for the chosen mixture, and was verified over the steady-state AVL 8 mode cycle, which approximates the heavy-duty transient certification cycle.

### *Selected Results*

Figure 1 shows that the power and torque curves are maintained over the full engine speed range under HCNG operation.

Figure 1

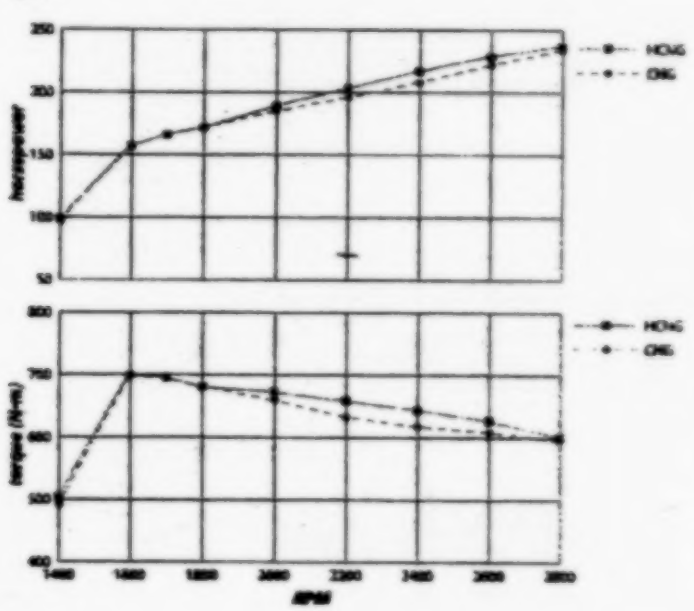
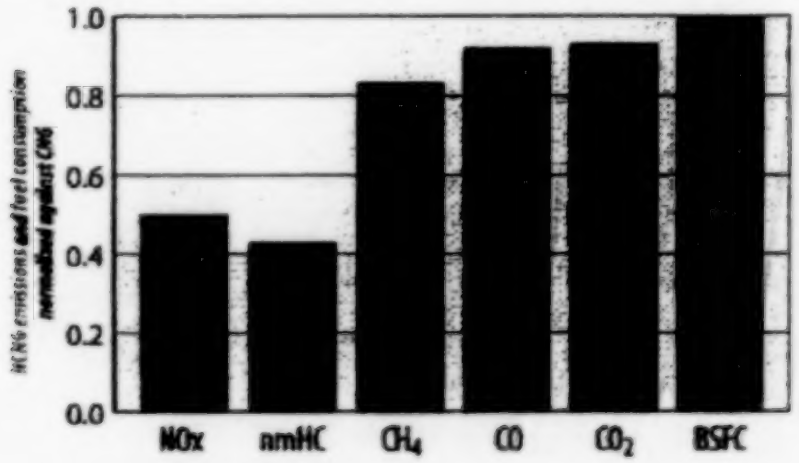


Figure 2 shows the pre-catalyst emissions results normalized compared to the original natural gas operation. It shows that NOx and nmHC emissions are reduced by 50%, while CO and $CH_4$ emissions are slightly reduced. As expected, $CO_2$ emissions are reduced by 7%, consistent

with the hydrogen energy content, and with the maintained fuel consumption also shown in Figure 2.

Figure 2




The engine transient response was found to equal that of the original natural gas engine operation over a simulated transient school bus cycle. The school bus cycle simulates transient changes in engine speed and load on an engine dynamometer representing driving of an actual heavy-duty vehicle involving idle operation, gear shifts, cruise and rated power operation.

### *HCNG Benefits*

An upgrade of Cummins Westport's engines to HCNG would allow hydrogen to become a more rapid part of the transportation fuel mix by enabling its usage in modern, electronically controlled engines. Within a short time, commercial Cummins Westport engines could be powering medium- and heavy-duty vehicles using hydrogen. This would catalyze the development of the hydrogen infrastructure needed for future vehicles powered by pure hydrogen.



Based on the results achieved in this project, it appears that substantial NOx reduction could be achieved compared to both regular natural gas operation and diesel operation. Opportunities may also exist for improved efficiency and lowered greenhouse gas (GHG) emissions.

### *Next Steps*

As part of the Sunline demonstration, the two HCNG buses will complete a 24,000 mile (38,624 km) on-road test starting in the summer of 2003, which will include chassis dynamometer testing of the vehicles. Two control CNG buses will also be monitored for comparison.

Opportunities exist to apply HCNG to other engines as well. An upgrade to the C Gas Plus engine rated at 280hp could be developed for large buses and trucks.

To develop a fully commercial engine, CWI will have to perform further product development tasks. For example, formal emissions certifications or verification tests should be conducted. Also, while previous demonstrations indicate that natural gas fuel system components are not affected by the presence of 3% hydrogen by mass, formal components durability testing must be completed.

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FUEL CELL BUS DEMONSTRATION PROJECTS

Hydrogen Fuel Cell & Infrastructure Technologies Program

[LOGO] U.S. Department of Energy
Energy Efficiency and Renewable Energy
Bringing you a prosperous future where energy is clean, abundant, reliable, and affordable

SunLine Test Drives Hydrogen Bus

**IN FALL 2002, SUNLINE TRANSIT AGENCY** became the first transit agency to put a hybrid fuel cell bus into routine passenger service. From November 2002 to February 2003, the prototype advanced technology bus served Palm Springs, California, which is not far from SunLine's hometown of Thousand Palms.

SunLine collaborated with the U.S. Department of Energy's (DOE) Hydrogen, Fuel Cells & Infrastructure Technologies (HFC&IT) Program on the evaluation of the 30-foot hybrid fuel cell bus that was developed by ThunderPower LLC, a joint venture by Thor Industries and ISE Research. The data gathered during the ThunderPower bus demonstration will help fleets make informed purchasing decisions and help researchers assess whether fuel cell vehicles can meet commercialization requirements.

This evaluation is one of several DOE projects that support the research and development of highly efficient, low- or zero-emission fuel cell power systems, which serve as an alternative to internal combustion engines. The demonstration is consistent with the HFC&IT goal of having advanced technology vehicles enter the marketplace by 2010.

**THE PRINCIPLE BEHIND FUEL CELLS** was discovered in 1839 but wasn't used in practical applications until the 1960s when fuel cells were selected to produce electricity for rockets during the Gemini and Apollo space programs. Fuel cells are favorable in transportation applications because they produce little noise, have no moving parts, and can increase a vehicle's operating efficiency by 20% to 30%.

The ThunderPower fuel cell bus has a compact but powerful 60-kilowatt fuel cell power plant to provide the required power. The propulsion system is efficient, quiet, and reliable and can triple the fuel economy of a conventional bus. Plus, the only emissions the system produces are water and air, making the bus a zero emissions vehicle.

The hydrogen fuel cell system in the ThunderPower bus works like this:

- A heavy-duty fuel cell uses hydrogen, which can be made from renewable sources (such as wind or solar power), and air to produce enough electricity to power the bus.
- The fuel cell produces electricity through a chemical process using hydrogen and oxygen from the air.
- The electricity is routed to electric motors that turn the wheels.
- On-board battery packs store energy to propel the bus and absorb energy during braking. This is known as "regenerative braking."

**THE THUNDERPOWER BUS** looks like a standard bus but is able to cover 11 miles on an energy equivalent gallon of hydrogen, nearly triple the fuel economy of a



30-foot conventional bus. It accommodates up to 26 riders and has a range of 175 to 200 city miles.

ISE Research (ISE-TVI) integrated the electric propulsion with the drive system power plant in collaboration with UTC Fuel Cells, which installed its newest technology proton-exchange membrane (PEM) fuel cell in the bus. The PEM combines a thin plastic film and a substance – called electrolyte – that increases the conduction of electricity.

Manufactured by Thor/ElDorado National, the bus chassis uses a drive system by ISE-TVI ThunderVolt™ and includes hybrid propulsion components of Siemens' ELFA™ propulsion system. A motive drive hybrid subsystem is based on a dual motor and controller set from Siemens. This includes a combining gearbox that directly couples to the two motors and provides a flange for a drive shaft to the differential.

The dual motor/controller set has a continuous power rating of 170 kilowatts and a peak power rating of 288 kilowatts. ISE-TVI also developed a communication system integrating the fuel cell, drive system, energy storage system, operator controls, accessory drives, and standard bus controls.

SunLine's Partners

In addition to DOE, SunLine benefits from the support of several partners. They include:

- **Demonstration partners:**
  Sacramento Municipal Utility District, the U.S. Department of Transportation, and South Coast Air Quality Management District

- **Technology partners:**
  ISE Research Corp. (system integration), UTC (fuel cell), Siemens (propulsion system), Thor/ElDorado National (bus chassis)
- **Evaluation partner:**
  National Renewable Energy Laboratory

**ACCORDING TO RESEARCHERS**, the commercial use of fuel cell buses may be 10 years away, but SunLine is off to a good start and is a recognized leader in selecting and using alternative fuels.

| THUNDERPOWER BUS FACTS | |
|---|---|
| Bus Chassis | Precommercial ElDorado National EZ Rider 2 |
| Model Year | 2002 |
| Length/Width/Height | 30 ft./102 in./137.5 in. |
| GVWR/Curb Weight | 34,000 lbs./25,180 lbs. |
| Seats | 26 (with no wheel chair spaces)<br>20 (with two wheel chair spaces) |
| Wheel Base | 160 in. |
| Service | Transit service (Line 50) |
| Drive System | High voltage electrical system |
| Engine | Two electric motors; inverters; combining gearbox; pre-commercial, zero emission fuel cell |
| Batteries | 48 Panasonic |
| Transmission | Automatic |
| Vehicle Controls | Multiplexing system controlling all operations (driver controls, air, hydraulic, cooling system, energy management) |



| | |
|---|---|
| Brakes | Regenerative with air support |
| Hydrogen Storage | On-board, pressurized tanks |
| Propulsion | UTC fuel cell (60 kW continuous), electric AC induction motors |
| Drive System | Siemens ELFA™ electric propulsion |
| Nominal Output | 2 x 85 kW @ 600 VDC |
| Peak Output | 2 x 140 kW |
| Rated Speed | 9,000 rpm |
| Storage Device | Battery (under floor in rear) |
| Battery Pack | 600V, 48 12 V batteries |
| Emissions Equipment | Zero emissions |
| Fuel | Hydrogen fuel cells |

In 1994, SunLine became the first U.S. public transit agency to abandon its diesel buses and switch overnight to an entire fleet of clean-burning compressed natural gas buses. Before the prototype fuel cell bus arrived at SunLine in 2002, the agency began generating hydrogen on site from solar power and reformed natural gas.

When the demonstration of the prototype fuel cell bus ended at SunLine, the transit agency began looking at options to acquire additional fuel cell buses. SunLine managers believe DOE's evaluation will be useful in establishing parameters, conducting environmental testing in extreme heat conditions, and transferring technology to the agency. SunLine looks forward to continuing its role as a test site for new fuel cells and systems.

The ThunderPower bus left SunLine for Chula Vista Transit to complete further testing and operation. Chula Vista is located just south of San Diego and is near ISE Research's home offices.

**For More Information**

Read about SunLine's experience with the ThunderPower bus in "ThunderPower Fuel Cell Bus Evaluation at Sun Transit Agency," a more detailed report that will be available in September 2003 on Alternative Fuels Data Center Web site (www.afdc.doe.gov). The publication will feature details on the buses' performance during its six months of operation at SunLine, including its three months of revenue service.

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**[LOGO]**
**Regional**
**Transit**

**SunLine**
***TRANSIT AGENCY***

# Three Year Comparison of Natural Gas and Diesel Transit Buses

**Revised August 1999**

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## *EXECUTIVE SUMMARY*

This report details the experiences of two California public transit agencies which replaced aging diesel buses with new compressed natural gas (CNG) buses in 1994. The operating characteristics and costs of 170 natural gas buses were compared with 73 older diesel buses. The natural gas bus fleets have operated well and led to cost reductions in both fleets.

The findings are particularly significant because both Sacramento Regional Transit District (RT) and SunLine Transit Agency have been using the same engine-chassis configuration, thus enabling a valid method to combine cost data for a large sample fleet of buses. The data indicates that labor for diesel equipment was almost twice that for CNG vehicles, parts were 25% more and fuel costs were nearly double.

In 1997, CNG buses saved RT over $1 million in fuel, maintenance, parts and hazardous waste disposal, a 38% per mile reduction over the cost of their diesel buses. This was an approximate cost savings that year of $0.197 per mile over 5.7 million miles with 136 buses. That same year, SunLine's CNG buses saved over $200,000, a 27% per mile reduction from the cost of RT's diesel buses. SunLine saved approximately $0.142 per mile over 1.5 million miles with 34 buses.

The incremental capital costs of CNG buses run between $35,000 and $50,000 more per unit. After three years and a combined 22.2 million miles of experience, the payback appears to be realized in approximately six to eight years or 250,000 to 350,000 miles per bus. Lower maintenance costs are attributable to thorough mechanic training and some CNG life-cycle cost reduction because of reduced engine wear.

With the absence of carbon deposits, the CNG engines at both agencies show no signs of needing a mid-life rebuild as usually done with diesel engines at approximately 250,000 miles. The Federal Transit Administration's standard 12-year replacement cycle could potentially be extended with maintenance practices concurrently improving chassis life expectancy.

Even though new CNG buses were compared to older diesel buses, the data show that the margin of cost reductions continues to grow over diesel. The rate at which diesel expenses climbed from 1995 to 1997 was 16%, while RT's CNG expenses went up 11% over the same period. This is particularly significant given that RT reduced their diesel fleet by 36% and increased the new CNG fleet by 30% during that time.



Particulate matter and other harmful emissions from CNG buses are greatly reduced over their diesel counterparts. Both Sacramento RT and SunLine have found a win-win in CNG as it is a more economical fuel over diesel and their respective communities enjoy the good citizenship of transit promoting cleaner air.

## *INTRODUCTION AND BACKGROUND*

At the beginning of their respective transitions to alternative fuel, Sacramento RT and SunLine were operating fleets of diesel buses that were reaching significant age and needing replacement. Both public agencies began independent research into the plausible alternatives and each decided upon CNG as the best choice at the given time. It became mere coincidence that they chose the same transit bus manufacturer, chassis and engine configuration, albeit determined in great part by the availability of California Air Resources Board-certified (CARB) engine choices.

While there are known air quality advantages of CNG fuel, what has been missing is a protracted study comparing the maintenance cost impacts of CNG to diesel. Reports at the onset of the alternative fuels movement featured small sample sizes and/or a relative short study of operating period. The data in this study was collected from a large sample of buses from two transit agencies. CNG versus diesel is compared head-to-head in equal service environments and maintenance practices.

RT first began service in 1973 in the growing Sacramento, California region. RT currently operates in a 418 square mile area serving a population of 1,060,000 with 60 bus

routes and light rail. The transit fleet consists of approximately 209 buses and 36 light rail vehicles. RT serves an area that the Environmental Protection Agency has classified as severe non-attainment for air quality and is committed to eventually replacing all diesel buses with buses fueled by lower emission CNG. Ridership on buses and light rail totals approximately 24,802,000 unlinked trips per year. Overall annual operating expense is approximately $55,000,000 for all agency-operations.

SunLine first began service in 1977 in the Palm Springs and desert resort region of the Coachella Valley in Southern California. The current population is more than 260,000 and the service area is approximately 406 square miles. Once having the dubious distinction of operating one of the oldest fleets in the country, in 1994 SunLine replaced its entire fleet with CNG buses. Ridership exceeds 3,500,000 per year. The overall annual operating budget is approximately $11,000,000.

Both CNG fleets surpass the 1994 CARB stringent emission standards, primarily in reduction of particulate matter and NOx emissions. Both agencies operate fueling stations on-site. Both systems have had steadily increasing ridership over the last few years.

### *PROFILE OF FLEETS*

In fixed route service, RT operated 136, 40-foot Orion V CNG buses built since 1993. These 136 buses operated approximately 5.7 million miles per year, each averaging about 42,000 miles per year. The 73 bus diesel fleet operated approximately 50 percent less.



SunLine operates a 100% CNG fleet of 34, 40-foot Orion V buses built in 1993 and 5, 29-foot El Dorado buses. For the purposes of this report, only the 34 Orion buses have been compared with RT's buses. Each vehicle averaged about 43,500 miles per year, together nearly 1.5 million miles in annual fixed route service. The study fleet composition is listed in Table 1.

**TABLE 1. STUDY FLEET COMPOSITION**

| Fleet | Quantity | | Year | Manufacturer | |
|---|---|---|---|---|---|
| | Diesel | CNG | | Chassis | Engine |
| RT | 48 | | 1990 | Gillig | Detroit Diesel 6V92TA |
| | 25 | | 1985 | Gillig | Detroit Diesel V92TB |
| | | 41 | 1996 | Orion | Cummins L10G/280 |
| | | 20 | 1994 | Orion | Cummins L10G/240 |
| | | 75 | 1993 | Orion | Cummins L10G/240 |
| SunLine | | 34 | 1993 | Orion | Cummins L10G/240 |
| **TOTAL** | **73** | **170** | | | |

Both agencies operate fully accessible fleets and complementary paratransit services, according to the Americans with Disabilities Act. The common CNG fleet configurations studied in this report are model years 1993/94/96 Orion V powered by 6 cylinder cummins L10G engines, original equipment manufactured for dedicated CNG operation. All buses at both agencies have bike racks to allow for multi-modal travel, wheelchair lifts, and air conditioning, due to extreme summer air temperatures in both regions. The diesel buses are model years 1985/90

Gillig powered by Detroit Diesel 6V92 series engines. These 2-stroke diesel engines are the most common source of bus power in the American public transit system.

## *METHODOLOGY*

This report was prepared by researching the maintenance records and databases of both agencies. RT and SunLine use different computer-based programs to track cost categories and have different philosophies on tracking the work order process as applied to cost allocations. Those differences were manually adjusted in the final analysis and cost breakdown, such that the data could be collated into matching categorical descriptions. It appears that this process was successful as indicated by the final totals for CNG-to-CNG cost performance between the two agencies.

**Assumption 1: New buses versus old**. It is difficult to quantify the maintenance advantage of a completely new bus in comparison to one that has been aged in service. Certainly, a new diesel bus would show maintenance cost advantages over an old diesel bus, and the new CNG buses are being compared to old diesel. For an agency attempting to discontinue diesel purchases, the CNG cost data can still be used to make comparisons to similar vintage diesel.

All of the buses show increasing annual expense as each of the fleets age. But, the margin of cost reductions of CNG buses over diesel continues to grow, as explained in the *Years to Year Costs* section (page 6).

**Assumption 2: Characterization of operating environments**. RT and SunLine have very similar transit duty demands on maintainability and reliability. Ambient temperature, weather and primarily flat terrain of service



area are similar. This factor is considered negligible as an effect in collating the cost data.

**Assumption 3: Weight disadvantages of CNG buses**. The weight of a CNG bus can be 2500 pounds more than a diesel bus because of the CNG storage cylinders. Yet this did not present a clear problem to either agency and operational cost savings were still substantial. Tire wear was included in the parts category. The intuitive conclusion for increased brake wear due to the resulting increased inertial forces was actually found to have decreased by using state-of-the-art transmissions employing a speed retarder for additional deceleration assistance. This same property would apply to new diesel buses, too.

**Assumption 4: Fuel range impacts**. The potential need for interim, enroute fueling was not a problem for either agency; each has its own fueling facilities on site. There was no attribution to maintenance for a roadcall to provide refueling (or "rescue") service because planning strategies have eliminated those type of roadcalls.

Of note, the fuel range on the Orion buses is specified to be at least 350 miles for equity to a diesel bus. Range can be less due to high ambient temperatures combined with CNG heat of compression and air conditioning use. Various management strategies are employed when routes are longer than the range. Rather than using maintenance servicing trucks, a coach operator may drive out to the relief point in a fully-fueled bus and have the relieved operator return to base in the bus lower on fuel. Another scenario may have coach operators exchange buses mid-route when one is traveling back to base. These options would then be reflected in operating cost rather than maintenance cost. Management planning is crucial within

the dispatch strategy to think through the mileage and bus range of each line. Dispatchers acknowledge that it is an easy process and soon becomes standard procedure.

**Assumption 5: Training the maintenance personnel**. Training cost is not a factor of this report because of its many variances, as well as a shared philosophy that training is part of "business as usual" and would apply to any fuel-bus configuration. Further discussion of training is in the section *Additional Investment in Switch to CNG (page 9)*.

**Assumption 6: Special projects**. During the study period SunLine was very active in assisting the clean fuels industry advance the development of technology by becoming a "beta" test site for commercialization via field demonstration. The labor involved in tracking those specific projects, as well as any impact to parts, has been deducted in the final analysis to remove the potential to skew results.

**Assumption 7: Extrapolation of capital cost recovery**. The only portion of capital investment considered is the incremental cost of bus price over a similar diesel bus. In calculating capital recovery periods, the cost of mid-life rebuild has been omitted. At this point in their maintenance history, mid-life CNG engine rebuilds will not need to occur as with diesel buses, since engine wear is substantially reduced.

## *DESCRIPTION OF COST CATEGORIES*

As was shown in *Public Transportation alternative Fuels . . . A Perspective for Small Transportation Operations* (Booz-Allen & Hamilton, Inc., 1992) use of "gaseous fuels



will potentially allow less maintenance and greater engine durability than operation with liquid fuels. This is because of the elimination of formation of deposits on the fuel injector tip, ring grooves, piston bowl and other combustion chamber surfaces. Oil change frequency is longer because of the reduction of formation of acidic products of combustion. Gaseous fuels will not dilute the lubricating oil, accelerating ring, cylinder and bearing wear" (pages 2-62).

Data from both agencies demonstrates this general assessment, as can be seen in the comparison of CNG and diesel maintenance costs (Table 2 and Figure 1). SunLine did not have diesel costs after 1994, since no diesel buses remained in the fleet after that time. RT continued to operate both diesel and CNG vehicles, so both comparative costs are available. Following is a discussion of 1997 statistics in Table 2.

**TABLE 2.**

**FY 1997 CNG VS. DIESEL COST PER MILE**

| Cost Category | CNG | | RT |
|---|---|---|---|
| | RT | SunLine | Diesel |
| Labor | .087 | .111 | .160 |
| Parts | .088 | .061 | .110 |
| Fuel | .122 | .178 | .223 |
| Oil | .006 | .012 | .007 |
| Indirect | .019 | .015 | .019 |
| **Total** | **$0.322** | **$0.377** | **$0.519** |

**Maintenance Labor**. Labor costs were computed for mechanics with chargeable time against a specific bus. Graffiti removal is included by SunLine in the labor and parts categories (body/glass). No administrative time is computed in this costs.

**Maintenance Parts**. Maintenance parts were consistent for both agencies, although coding for computer input varied somewhat. All parts chargeable to a specific bus were included. In general, categories included: heating/ventilation/air conditioning, body/glass, headsign, wheelchair lift, farebox, brakes, suspension, tires, driveline, cranking/charging, electrical, engine/transmission cooling, preventive maintenance, accident, and vandalism.

**TABLE 3.**

**FUEL PRICES (PER GALLON EQUIVALENT)**

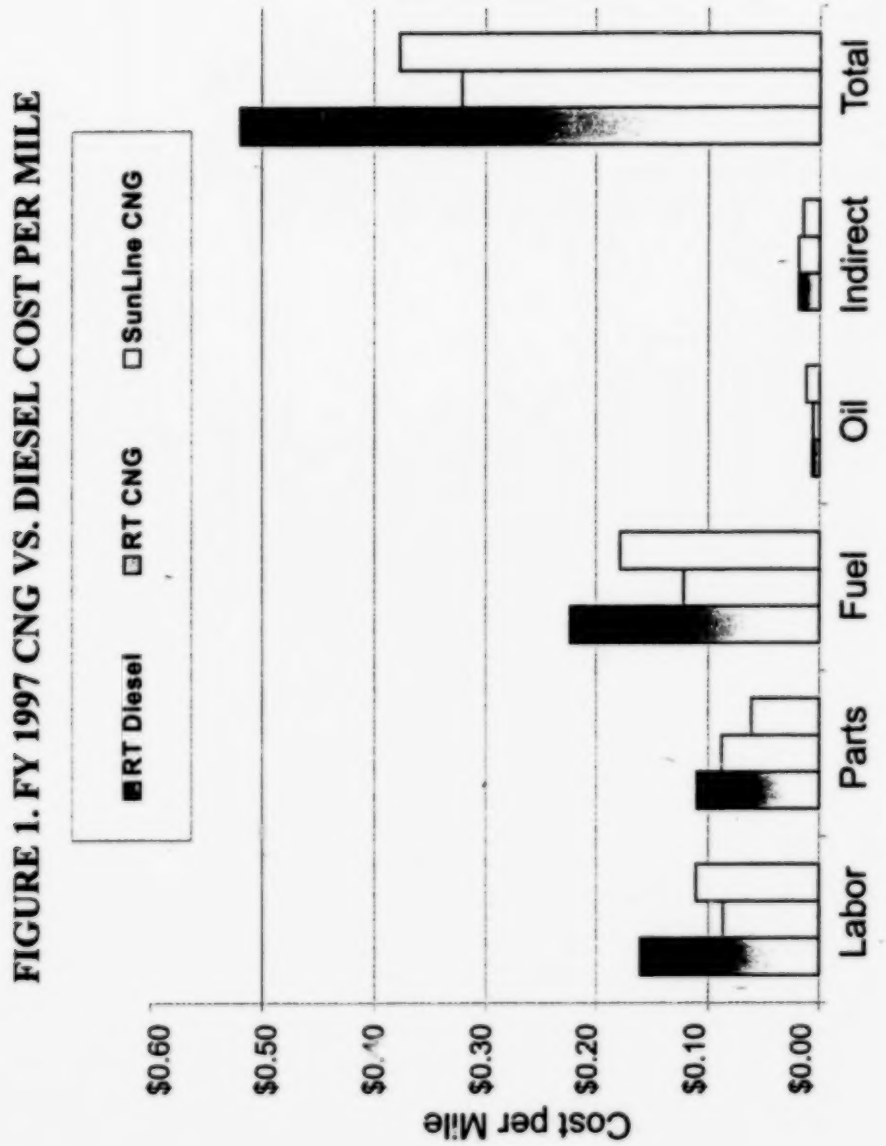
| | CNG | | RT |
|---|---|---|---|
| | RT | SunLine | Diesel |
| 1995 | $0.283 | $0.538 | $0.692 |
| 1996 | .380 | .600 | .735 |
| 1997 | .402 | .551 | .599 |

**Fuel**. The cost of compression (capital, electricity, and maintenance) was not included in the figures of Table 2. RT owns 100% of its fueling facility. SunLine owns 25% of one facility and 90% of another facility. These percentages are used in fuel cost calculations. On Table 3 is a listing of fuel prices for CNG and diesel over the years of the study. While RT's diesel buses averaged 3.51 miles per gallon, their most recent mileage for CNG buses was 3.07 and SunLine's was 3.09 miles per equivalent gallon.

**Oil**. This category includes only the cost of oil, while other associated preventive maintenance costs (such as the filters and labor), are allocated against parts and labor, respectively. Both agencies have monitored oil quality through independent analysis and are able to extend oil change intervals between 10,000 to 12,000 miles.



**Indirect Costs**. Indirect costs include "bench stock," overhead, and minor parts such as bulbs, fuses and hoses which are generally low cost and not charged to specific buses. Over several years, these costs can vary dramatically depending on bulk purchases, fleet diversity and specific fleet issues. Although these costs were a minor portion of the overall cost, sometimes varying accounting procedures can affect this type of line item.






## *MAINTENANCE COST SAVINGS ANALYSIS*

**FY 1997 Category Costs**. RT labor and fuel for the older diesel buses were nearly twice that for CNG buses and parts were 25% more. Indirect costs and oil remained approximately the same during the reporting period, since RT had not yet decreased the frequency of oil changes for the CNG buses. Oil change frequency has since gone from 8,000 miles to 10,000 miles.

For FY97, the data shows that CNG buses saved RT $1,122,900 in fuel, maintenance labor, and parts. This is significant with cost savings of $0.197 per mile over 5.7 million miles using 136 buses.

That same year, SunLine saved approximately $213,000, or $0.142 per mile over 1.5 million miles with 34 CNG buses. Similar to RT, cost savings are seen in fuel, maintenance, and parts. Oil changes for SunLine did occur every 6,000 miles while the buses were under warranty, and now oil changes are performed every 12,000 miles and carefully monitored by analysis.

The total cost per mile differences between the two transit agencies can be attributed to various factors. SunLine has an aggressive preventive maintenance program (PM), and therefore PM costs (labor and materials) account for 23% of the budget, whereas at RT it comprises 16%. This particularly rigorous program is also due in large part to the desert climate of the SunLine service territory, where blowing sand is a daily occurrence and vehicles must be cleaned thoroughly. SunLine also uses each vehicle approximately 3% more than RT in revenue service.

Indirect costs were slightly higher for RT than for SunLine due to the diversity of its fleet, requiring more overhead in bench stock/small parts.

**Year-to-Year Costs**. Cost savings can be attributed, in part, to the newness of the CNG buses. Any new bus might cost less to maintain than an older model, especially during the manufacturer's warranty period.

As expected in the data of Table 4, all of the buses showed increasing annual expense as the fleets aged. It is interesting to note that although there were expected cost savings in the first years on CNG due to the warranty coverages, the margin of cost reductions continues to grow over diesel. Figure 2 represents the rate at which costs grew by comparing the slope of trending costs. Diesel expenses climbed 16% from 1995 to 1997, while CNG expenses went up 11% over the same period for RT. That is even more significant when considering RT reduced its diesel fleet by 36%, increased the *new* CNG fleet by 30% over the same time frame, *and* the diesel buses incurred about 50% less miles each year than the CNG buses.

SunLine had higher expenses in FY95 relative to the next two years that could be attributed to two significant situations. First there was a pressure relief device (PRD) failure[1] in December 1994 that required removal and

[1] SunLine had a high pressure PRD failure inside the maintenance garage leading to a burn of vented fuel, causing no harm to personnel or damage to buses, but minor facility damage. The extreme cost impact was to hazardous material clean-up caused by fire suppression sprinkler flow into, and subsequent overflow of, waste oil reservoirs creating a massive oil spill on the property. For more details, see the article

(Continued on following page)



replacement of PRDs for the total fleet. That event would have contributed a cost of vented fuel loss to depressurize the storage system and increased mechanic time to accomplish the upgrade to newer PRDs (RT upgraded in FY97). Second, in January 1995 SunLine opened a second operating division that required the additional expense of mobile fueling of the fleet until the installation of a fixed-site compressor station.

The significant conclusion depicted here is that the reduced rate of CNG cost growth may indeed be an indicator of lower life cycle costs as addressed in the cost category descriptions and the increasing cost savings shown in Table 5.

**TABLE 4. YEAR-TO-YEAR COMPARISON TOTAL COST**

| | | Dollars per 1000 Miles | | |
|---|---|---|---|---|
| **Fuel Type** | **Agency** | **FY 1995** | **FY 1996** | **FY 1997** |
| Diesel | RT | 447 | 466 | 519 |
| CNG | RT | 290 | 294 | 322 |
| | SunLine | 366 | 343 | 377 |

**TABLE 5. YEAR-TO-YEAR COMPARISON COST SAVINGS**

| Dollars per 1000 Miles | | | |
|---|---|---|---|
| **Agency** | **FY 1995** | **FY 1996** | **FY 1997** |
| RT | 157 | 172 | 197 |
| SunLine | 81 | 123 | 142 |

published in *Natural Gas Fuels Magazine*, November 1995, *Safety First: Lessons Learned from a Pressure Relief Device Failure*.

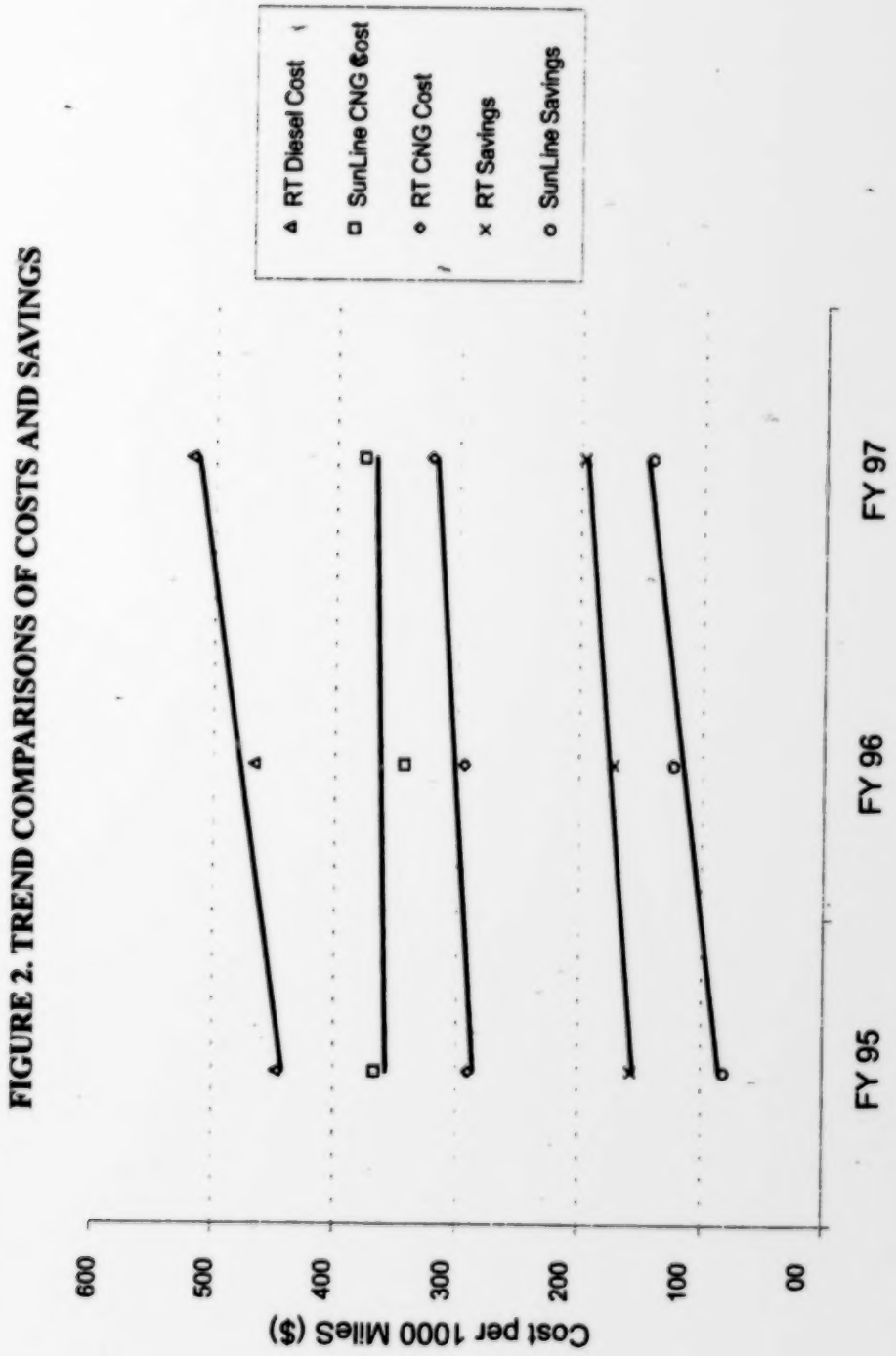



**FIGURE 2. TREND COMPARISONS OF COSTS AND SAVINGS**



## *ADDITIONAL SAVINGS*

Both RT and SunLine are experiencing cost savings in hazardous waste disposal. This can be explained because of fewer oil changes. Since the 4-stroke, spark-ignited engine remains cleaner in the absence of heavy particulate matter, it does not require steam cleaning as often, which in California creates hazardous waste that must be carried away for disposal. In addition, clean-up in the shop and in the parking area is also substantially less. SunLine's hazardous waste disposal costs have decreased approximately 72% since removal of diesel buses from the fleet. RT's hazardous waste costs have decreased by one third, but are expected to decrease further as fewer diesel buses make up the fleet.

Roadcalls have not been compared because of the diversity of reporting procedures between the two agencies. For example, the Federal Transit Administration (FTA) does not specify that a malfunctioning air conditioner is a roadcall, but both agencies count these as roadcalls because of climatic conditions. Still, neither agency has experienced a significant number of CNG-system related road calls.

The transit industry diesel average is approximately 4,000 miles between road calls for all categories. Even with variances in reporting between the two agencies, the differences are impressive. SunLine's most recent figures exceeded 29,000 miles between road calls. RT's most recent figures show the CNG bus average exceeded 8,500 miles compared to 6,200 miles between road calls for their older diesel buses. SunLine's advantage can be attributed to an innovative practice of a joint inspection by the operator and mechanic when the bus returns from service

each day. This reduces the potential of unreported problems producing road calls.

### *INCREMENTAL COST PAYBACK*

Until the manufacturing volume of CNG buses begins to match that of their diesel counterparts, the incremental cost of a CNG-equipped bus will be higher (currently between $35,000 and $50,000 more per unit). At the rate of savings experienced during the first three years of operation, the payback of the incremental cost would occur about half way through the life of the buses. Table 6 shows the payback calculated at $50,000 incremental cost per unit without consideration of life cycle cost factors.

All information currently gathered indicates CNG will have a favorable reduction in life cycle costs. RT sought to find out whether their fleet would need the mid-life engine rebuild normally required for diesel engines at 250,000 miles. Cummins West, Inc., analyzed internal wear factors to assess engine durability during disassembly of an RT engine which had 296,628 miles. The engine was found to be in very good condition and no problems were discovered which would have prevented it from continuing to operate in the fleet. The internal report noted that the bearings could easily go for double the mileage, the crankshaft was reusable without rework, the pistons were visually in "new" condition, and the oil pump was in excellent condition.

With the absence of carbon deposits, additional life-cycle cost savings have resulted as the CNG engines at both agencies show no signs of needing a $3,000 to $4,000 mid-life rebuild.



**TABLE 6. PAYBACK OF INCREMENTAL COSTS**

| | Number of Buses | Incremental Cost per Bus | Savings per Year | Payback* in Years | Miles per Bus |
|---|---|---|---|---|---|
| | | | per Mile | | |
| RT | 136 | $ 50,000 | $1,122,900 | $ 0.197 | 6.1 | 253,807 |
| SunLine | 34 | $ 50,000 | $ 213,000 | $ 0.142 | 8.0 | 352,113 |

* FTA guideline for the planned replacement life of a bus is 12 years or 500,000 miles.

### *ADDITIONAL INVESTMENT INSWITCH TO CNG*

Both agencies experienced initial costs of fuel station installation, facility modifications and training for both mechanics and operators. Other than the fuel station capital cost recovery in the price of fuel, these costs were not factored into the cost per mile comparisons.

**Fueling and maintenance facilities**. SunLine spent $1.47 million to design and construct its CNG fueling facility and adapt the maintenance facility. In partnership with Pickens Fuel Corporation, SunLine operates a public access 1200 scfm fuel station with two compressors. SunLine has a 25% ownership share and receives credits for all fuel sales; therefore, some of the capital costs are offset by the volume of sales to neighboring public and private fleets. Facility renovations included automated make-up air ventilation integrated into gas detection/alarm systems of 12 sensors for automatic activation of the new mechanical exhaust fans, explosion proof electrical conduit, sealed sulfur lighting, and totally enclosed heaters.

RT spent $3.5 million to design and construct its CNG fueling facility and adapt the maintenance facility. This included three compressors, dehydrators, buffer vessels, dispenser/control units, control room and emergency shutdown (ESD) system. RT's design, similar to SunLine's, incorporated 28 gas/fire sensors that detect the presence of gas and increased shop air flow through the installation of several new ventilation systems, both electric and passive.

It should be noted that many of these up-front costs of facility modification were incurred for safety reasons and a vast array of choices exist between regulatory jurisdictions



in interpreting guidance for the acceptable level of mitigation versus the potential for a hazardous occurrence.

**Mechanic training**. SunLine's mechanics attended 100 hours of training at College of the Desert (COD), which cost approximately $84,000 in mechanic wages and benefits. RT invested between $27,000 and $30,000 in labor costs to retrain their mechanics.

As is the case with any relatively new product, personnel need to be trained in order for the introduction of the new technology to be successful. SunLine and RT firmly believe the positive results shown in this study are directly related to thorough training practices. For training to be effectively implemented there has to be a commitment from top management toward the alternative fuel and acceptance of lost productivity during the transition period.

**Costs of New Technology and the Payback**. As discussed in the *Maintenance Cost Savings Analysis* section (page 6), both agencies replaced pressure relief devices which affected expenses. In 1998 following this study, RT began replacing their EDO brand cylinders because of a leakage problem, whereas cylinders usually last 15 years.

The up front costs incurred in fueling and maintenance facilities are not calculated here in terms of payback. Because both agencies have committed to procurement of a growing number of CNG vehicles over time, it would be inaccurate to load the upfront infrastructure costs against the initial vehicles. In SunLine's case, public access infrastructure supports paratransit and non revenue vehicles, as well as a variety of local government vehicles and heavy duty refuse trucks. At RT, their CNG bus fleet is growing each year and their 200+ fleet will be all CNG

in the next few years. Both agencies are in natural gas for the long run, and the greater the number of vehicles using the infrastructure, over time, the lower those costs are per vehicle and operating costs per mile.

Infrastructure is a substantial cost, but one that can be offset either by making the fueling facility a profit center (as SunLine has done) or by not incurring those costs at all by fueling off-site. Another way of looking at the cost is determining the cost of a diesel fueling facility and its ongoing facility costs.

## *POLICY IMPLICATIONS AND CONCLUSION*

The savings resulting from CNG buses help maintain an equitable pace with inflation, thus enabling both agencies to plan for vehicle replacements and possibly add service, as the stability of future funding allows. Lower maintenance costs are attributable to thorough mechanic training. There also appears to be some longevity advantage for CNG life-cycle cost reduction because of reduced engine wear due to fewer engine deposits, resulting absence of engine knock, better oil life, and longer life of reciprocating engine components.

With the absence of carbon deposits leading to longer life of load bearing surfaces, the CNG engines at both agencies show no signs of needing a rebuild as is normally done with diesel engines at 250,000 miles. The Federal Transit Administration's standard 12-year replacement cycle could potentially be extended with maintenance practices concurrently improving chassis life expectancy (in favorable climactic environments). Particulate matter and other harmful emissions from CNG buses are greatly reduced over their diesel counterparts.



Prior studies indicate the operating costs of CNG buses are generally higher or about the same as diesel, but the number of CNG buses compared was much smaller than the number of diesel vehicles. The cost to operate five CNG buses at Pierce Transit was $0.28/mile and five CNG buses at Metro-Dade was $0.55/mile, as reported in the October 1996 National Renewable Energy Laboratory's (NREL) *Alternative Fuel Transit Buses, Final Results . . . from a Vehicle Evaluation Program*. The NREL study was closely matched with diesel controls. RT and SunLine's data are within the best and worst range of that report but showed much better results over diesel, which could be partly attributed to the age of RT's diesel engines.

RT will continue to procure buses with CNG engines to meet the goal of replacing the entire fleet by 2003. SunLine will continue to purchase only CNG or new clean technology replacement vehicles for service operation and support. Both agencies will pursue all subsequent improvements to CNG technology, with the goal of providing more reliable vehicles in a cleaner environment.

Use of CNG technology also improves the image of mass transit. Transit buses are usually thought of as belching black smoke, and no driver enjoys being behind a bus in slow moving traffic. CNG buses emit no black smoke particulates, which stain the buses making them appear unattractive, and they are also quieter to operate. This presents a more appealing perspective of bus riding; hopefully encouraging more individuals to use mass transit and take community pride in their transit systems.

In August of 1998, California became the first state in the nation to declare that diesel exhaust is a toxic air contaminant, one that can cause cancer and other disease.

With the growing environmental and health concerns of diesel, both agencies are sending strong messages to the citizens of their communities that alternative fuels help maintain a clean environment. Elected officials at both public agencies share a commitment to use alternative fuels and assist other local partners in using alternative fuels. Such efforts are already occurring with sanitation/refuse haulers, local water districts, car rental agencies, shuttle services, and municipalities. Both agencies are active participants in their regions' U.S. Department of Energy Clean Cities programs.

CNG buses support the local economies of Sacramento as the California state capitol, and the Coachella Valley as an international resort destination. Air quality is an important destination criteria to visitors and residents alike. Both Sacramento RT and SunLine have found a win-win in CNG with significant maintenance savings and emission reductions. It is more economical to power buses on CNG than diesel and both communities take pride in transit's leadership in promoting cleaner air.

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*The authors wish to thank staff from the following organizations for their technical review of the article before final publication: Clean Air Now (Riverside, California), Gas Research Institute (Chicago, Illinois), INFORM (New York, New York), National Renewable Energy Laboratory (NREL: Golden, Colorado), Natural Gas Vehicle Coalition (Washington, D.C.).*

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Supreme Court, U.S.
FILED
NOV 17 2003
OFFICE OF THE CLERK

No. 02-1343

IN THE

# Supreme Court of the United States

ENGINE MANUFACTURERS ASSOCIATION AND WESTERN STATES PETROLEUM ASSOCIATION,
*Petitioners*,

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, *et al.*,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, JOINED BY THE STATE AND TERRITORIAL AIR POLLUTION PROGRAM ADMINISTRATORS, AND ASSOCIATION OF LOCAL AIR POLLUTION CONTROL OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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## QUESTION PRESENTED

Whether section 209(a) of the Clean Air Act, 42 U.S.C. § 7543(a), preempts state and local clean air regulations that enhance the market for cleaner fleet vehicles, such as urban transit buses, without imposing any production mandates or other obligations on manufacturers.

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## INTEREST OF THE *AMICI CURIAE*

*Amici* National League of Cities, National Conference of State Legislatures, National Association of Counties, Council of State Governments, International City/County Management Association, U.S. Conference of Mayors, and International Municipal Lawyers Association are organizations whose members include state and local governments and officials throughout the United States.[1] *Amici* State and Territorial Air Pollution Program Administrators and Association of Local Air Pollution Control Officials are national associations representing air pollution control agencies in 53 States and territories and more than 165 major metropolitan areas across the United States. *Amici* have a compelling interest in preserving the longstanding power of state and local governments to protect public health and the environment.

*Amici*'s members currently face the enormous task of complying with new federal air quality standards for soot and ozone issued by the U.S. Environmental Protection Agency in 1997. It is vital that these officials retain the flexibility envisioned by Congress to adopt and implement creative controls on significant sources of air pollution such as motor vehicles. Invalidation of innovative programs such as respondent South Coast Air Quality Management District's ("South Coast's") Fleet Rules would adversely affect state and local economies by unfairly shifting more of the compliance burden on small businesses and other stationary sources of pollution.

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[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity other than the *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of *amicus* briefs and have filed letters of blanket consent with the Clerk.

*Amici*'s members include local governments that are part of the regulated community subject to the Fleet Rules. These municipalities might well become subject to additional controls on vehicle purchases imposed by state and regional authorities. *Amici* recognize, however, that fleet purchase requirements and similar rules often create economies of scale that benefit the citizenry of the regulated jurisdictions. As members of the regulated community, *amici* fully support respondents' position.

The Clean Air Act promotes cooperative federalism by making state and local governments hands-on partners with the federal government. *See* 42 U.S.C. § 7401(a)(3) (state and local governments have "primary responsibility" for improving air quality); *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 470 (2001) ("It is to the States that the CAA assigns initial and primary responsibility for deciding what emissions reductions will be required from which sources."). Notwithstanding petitioners' suggestion to the contrary (Br. 2), the Act's cooperative federalism extends to mobile sources, with States expressly encouraged to adopt innovative programs to reduce mobile source pollution. *E.g.*, 42 U.S.C. § 7408(f) (requiring EPA to assist the States in adopting a lengthy list of mobile source controls). Even prior to the passage of the Act, many state and local governments, particularly California, were already regulating mobile sources of air pollution to protect public health and the environment.

To be sure, section 209 of the Act strikes a compromise between the interests of States and automakers by preventing the States from requiring manufacturers to build 50 different kinds of cars to comply with 50 sets of emission standards. But section 209 should be interpreted in a way that preserves the authority of state and local governments to impose controls on vehicle purchasers designed to reduce motor vehicle emissions. The Court's well-settled presumption



against preemption, as well as its concomitant narrow interpretation of express preemption provisions, promotes "federalism concerns and the historic primacy of state regulation of matters of health and safety." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

Because of the importance of these issues to *amici* and their members, this brief is submitted to assist the Court in its resolution of this case.

## SUMMARY OF ARGUMENT

1. The text of section 209 and the Clean Air Act as a whole shows that the Fleet Rules are not "standards" preempted by section 209(a). The repeated references to "standards and other requirements" in other portions of section 209 make clear that the term "standard" in section 209(a) does not embrace any "requirement" related to the control of emissions from new motor vehicles as argued by petitioners. Rather, the use of "standard" in related provisions shows that the term is limited to numerical specifications for vehicle emissions imposed on manufacturers. Indeed, the one provision of the Act that expressly addresses fleet purchase requirements, section 246, refers to these rules not as "standards," but as "requirements."

In keeping with the text, structure, and history of section 209(a) and the Act, the U.S. Environmental Protection Agency has long interpreted the term "standard" to refer exclusively to numerical emission limits imposed on manufacturers. *E.g.*, 66 Fed. Reg. 57,223, 57,225 (Nov. 14, 2001). EPA has statutory authority to define the term "standard" as used in section 209 and Title II generally, but never in the 36-year history of section 209 has EPA or any court applied the term "standard" to rules that impose obligations on vehicle purchasers rather than manufacturers.

The distinction relied on by the courts below between standards imposed on manufacturers and requirements imposed on purchasers adheres to the text, structure, and history of the Act. It also makes good sense from an economic policy perspective. Purchase requirements generally are less burdensome on manufacturers than emission standards and often benefit the regulated community by creating economies of scale and lower overall costs for purchasers that would not otherwise exist.

2. Petitioners read section 209 as invalidating any state or local law that refers in any way to numerical emission standards or vehicle design criteria related to emissions, even where the law imposes no requirements on manufacturers. This reading would undermine the cooperative federalism that underlies protections for public health and the environment by invalidating many state and local laws designed to improve air quality.

Petitioners' unduly broad reading of section 209 also would have substantial economic consequences for state and local governments. EPA's new air quality standards for smog and soot will impose enormous compliance costs. *See Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001). As state and local officials endeavor to find ways to meet these new standards, petitioners' broad reading of section 209(a) would improperly tie their hands, preventing them from adopting creative demand-side programs designed to reduce motor vehicle emissions. Petitioners' hair-trigger preemption test would foist an unfair portion of the compliance burden on small businesses and other stationary sources, render this Court's presumption against preemption a hollow promise, and undermine Congress's stated intent that air quality officials have the flexibility necessary to meet the Act's requirements in a balanced and responsible way.



## ARGUMENT

This brief supports respondents in three ways. In Section I, *amici* show that the Fleet Rules and similar state and local requirements imposed on purchasers of motor vehicles are fully consistent with the text, structure, and history of section 209 and the Act as a whole, as well as EPA's longstanding interpretation of the term "standard" in section 209. Section II.A describes innovative state and local initiatives designed to improve air quality that could be jeopardized by petitioners' reading of section 209(a). In Section II.B, *amici* discuss the adverse economic consequences of adopting petitioners' expansive reading of section 209(a).

### I. SOUTH COAST'S FLEET RULES ARE NOT "STANDARDS" PREEMPTED BY SECTION 209(a).

#### A. The Text, Structure, and History of the Clean Air Act Show that the Fleet Rules Are Not "Standards."

The central legal issue in this case is whether the term "standard" as used in section 209(a) should be read broadly, as petitioners contend, to mean any requirement related in any way to the control of new motor vehicle emissions or, as the courts below held, more narrowly to refer only to numerical emission limits imposed on manufacturers.

The text of section 209 compels rejection of petitioners' broad reading. Section 209(b)(1)(C), for example, refers to "standards and accompanying enforcement procedures." 42 U.S.C. § 7543(b)(1)(C). Clearer still is section 209(e)(1), which preempts "any standard and other requirement" relating to the control of emissions from nonroad vehicles and engines such as trains and farm equipment. *Id.* § 7543(e)(1). Section 209(e)(2) likewise refers to "standards and other requirements" in the context of authorizing California to

adopt controls on nonroad vehicles. *Id.* § 7543(e)(2). Petitioners do not—and could not plausibly—argue that the term "standard" has a different meaning in these other subsections of section 209.

Section 209's express references to enforcement procedures and other requirements plainly would have been unnecessary if the term "standard" were broad enough to encompass any requirement relating to the control of emissions. In *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978), the Court relied on similar textual distinctions between "standards" on the one hand, and "'techniques,' 'controls,' and 'technology'" on the other to interpret the word "standard" in section 112 of the Act to mean a quantitative limit. *Id.* at 286. Although Congress subsequently amended the Act to expand the scope of section 112, *Adamo Wrecking*'s interpretive principle still holds. Petitioners' reading of section 209 contravenes "the 'settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect.'" *Dole Food Co. v. Patrickson*, 123 S.Ct. 1655, 1661 (2003) (quoting *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992)).

Other related provisions in Title II of the Act compel a reading of the term "standard" as referring exclusively to numerical emission limits imposed on manufacturers. Section 202 of the Act, which requires EPA to prescribe "standards" applicable to new motor vehicles, uses the term "standard" more than 100 times, each time either as an express numerical limit on manufacturers or in a manner consistent with that reading.[2] The same holds true for

[2] *E.g.*, 42 U.S.C. § 7521(a)(3)(B)(ii) (requiring standards for oxides of nitrogen from heavy-duty trucks that "provide that such emissions may not exceed 4.0 grams per brake horsepower hour"); *id.* § 7521(a)(6) (requiring standards for onboard vapor recovery systems with a "capture efficiency of 95 percent"); *id.* § 7521(b)(1)(A) (requiring standards providing that emissions for model years 1977 through 1979 "may not exceed 1.5 grams per vehicle mile of hydrocarbons and 15.0 grams per vehicle mile of carbon monoxide"); *id.* § 7521(b)(1)(B) (requiring standards providing that emissions for model years 1977 through 1980 for oxides of nitrogen "may not exceed 2.0 grams per vehicle mile"); *id.* § 7521(g) & Table G (specifying numerical standards for certain light-duty trucks); *id.* § 7521(h) and Table H (same).



provisions that require standards for nonroad engines and vehicles, 42 U.S.C. § 7547(a), urban buses, *id.* § 7554, and clean fuel vehicles. *Id.* §§ 7583-7585.

Like section 209, section 202 plainly distinguishes standards from requirements, for example authorizing "requirements to control rebuilding practices [for heavy-duty engines], including standards applicable to emissions." *Id.* § 7521(a)(3)(D). In language that could not be clearer, Section 202(g)(1) requires "standards which provide that emissions from a percentage of each manufacturer's sales volume" meet specified numerical limits. *Id.* § 7521(g)(1). Petitioners fail to cite a single instance in which Title II of the Act clearly uses the term "standard" to refer to controls imposed on vehicle purchasers.

Also telling is section 246, which requires States to establish clean vehicle purchase requirements for centrally fueled fleets in areas designated as serious, severe, or extreme nonattainment areas. *Id.* § 7586. Throughout this lengthy provision, Congress repeatedly refers to fleet purchase programs not as "standards," but as "requirements." *E.g.*, *id.* § 7586(a)(3) (referring to the fleet program "requirements"); *id.* § 7586(b) and table (referring to a phase-in of the fleet program "requirements"); *id.* § 7586(c) (same); *id.* § 7586(d) (referring to the fleet program "requirements of this subsection"); *id.* § 7586(f)(2)(B) (same). The only use of the term "standard" in this provision comes in contexts that make clear that the referent is a numerical limit on emissions imposed on manufacturers. *See id.* § 7586(c) (referring to numerical emission standards issued under § 7583); *id.*

§§ 7586(f)(1)(B) & (C), (f)(4) (referring to numerical emissions for Ultra-Low Emission Vehicles and Zero Emission Vehicles); *accord* Clean Fuel Fleet Program, 58 Fed. Reg. 64,679, 64,679 (Dec. 9, 1993) (referring to fleet program "requirements" that mandate the purchase of vehicles that meet clean fuel vehicle emission "standards"). This clear textual distinction between "standards" and "requirements" in section 246's fleet purchase provisions undermines petitioners' reading of "standard" as including fleet purchase requirements and similar programs.

If the term "standard" embraced obligations imposed on purchasers such as the Fleet Rules, one would expect to find some reference to these purchaser obligations in Title II's enforcement sections and other provisions. In fact, Title II contains dozens of references to the obligations imposed on manufacturers and dealers (*e.g.* 42 U.S.C. §§ 7522 (prohibited acts), 7524 (civil penalties), 7525 (certification)), but does not contain a single reference to any obligation imposed on consumers or purchasers.

Given the Act's consistent use of "standard" in Title II to mean numerical emissions limits imposed on manufacturers, the Act plainly does not reflect the requisite "clear statement" or "clear and manifest purpose" needed to preempt the historic authority of state and local governments to improve air quality by imposing restrictions on purchasers. *Cf. City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 429 (2002) ("absent a clear statement to the contrary," an express preemption provision should be read to preserve traditional state and local prerogatives); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (federal statutes should not be read to preempt historic police powers of the States "unless that was the clear and manifest purpose of Congress").

The regulatory history of section 209 confirms the evidence found in the Act's text and structure regarding the



meaning of "standard." Although section 209 has been in effect for more than 30 years, and although EPA has statutory authority to issue rules implementing section 209(e) and other key provisions that use the term "standard" (*see, e.g.*, 42 U.S.C. §§ 7543(e)(2), 7521(a)(1)), petitioners fail to cite a single EPA regulatory decision or judicial ruling determining that the term "standard" as used in Title II applies to regulations directed at purchasers of motor vehicles rather than manufacturers or distributors.[3]

In fact, since the 1970s EPA has relied on the same textual distinctions set forth above to contend successfully that "standard" refers exclusively to quantitative or numerical limits imposed on vehicle manufacturers. For example, in *Motor & Equipment Manufacturers Ass'n v. EPA*, 627 F.2d 1095 (D.C. Cir. 1979), the D.C. Circuit adopted EPA's position that "the word 'standards' connotes a numerical value setting the quantitative level of permitted emissions of pollutants by a new motor vehicle." *Id.* at 1111. The court emphasized that in interpreting section 209, EPA "has consistently made a distinction between standards and accompanying enforcement procedures, confining the former to regulations on quantitative levels of emissions." *Id.* at 1113, 1114 n.38 (citing 43 Fed. Reg. 9344, 9345 (1978); 42 Fed. Reg. 3192, 3194 (1977); 36 Fed. Reg. 17,458 (1971)).

Just two years ago, EPA reiterated that "[a]n emission standard under 209(a) and (e) is a quantitative limit on emissions of a pollutant from an engine, vehicle or piece of

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[3] *Engine Mfrs. Ass'n v. Huston*, 190 F. Supp.2d 922 (W.D. Tex. 2001), *vacated as moot*, No. 01-50819 (5th Cir. Mar. 5, 2002), cited by certain industry *amici*, is not to the contrary because it involved preemption of nonroad vehicle regulation under section 209(e), which applies to "standards and other requirements." The *Huston* court distinguished section 209(e) from section 209(a) based on their different phraseology. *Id.* at 927.

equipment." Approval and Promulgation of Implementation Plans: Texas, 66 Fed. Reg. 57,223, 57,225 (Nov. 14, 2001). Moreover, EPA simultaneously confirmed that the term "standard" refers to limits imposed on manufacturers (not purchasers), adding that "[t]he means for achieving [a standard] are typically through modifying or changing the engine or equipment itself." *Id.*

This agency reading of "standard" as used in section 209(e) is especially significant because section 209(e)(2) requires EPA to issue regulations implementing this provision. The agency's interpretation of "standard" in section 209 thus deserves substantial deference. *See, e.g., United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) ("We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.").

This recent reiteration of EPA's interpretation of "standard" came in the context of EPA's approval of revisions to the Texas State Implementation Plan, which included rules restricting the use of certain nonroad engines to certain times of the day and months of the year. *See* 66 Fed. Reg. at 57,223. Rejecting industry objections that section 209(e) preempts the Texas rules, EPA observed that it had previously issued rules under section 209(e) interpreting the term "standard" as referring solely to quantitative emission limits imposed on manufacturers. *Id.* at 57,225 (citing Air Pollution Control: Preemption of State Regulation for Nonroad Engine and Vehicle Standards, 59 Fed. Reg. 36,969 (July 20, 1994) and Control of Air Pollution, 59 Fed. Reg. 31,306 (June 17, 1994)). EPA further noted that the D.C. Circuit had upheld the rules, including these interpretations, against industry challenge. *Id.* at 57,225 (citing *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075 (D.C. Cir. 1996)).



EPA's longstanding interpretation of section 209 is entitled to substantial deference notwithstanding the *amicus* brief filed by the United States in this case, which argues for a broader reading. EPA is notably absent from that brief, which fails to account for the agency's consistent interpretation to the contrary. Where, as here, the Solicitor General's position conflicts with the expert agency's longstanding interpretation as expressed in congressionally authorized rulemakings, it is the agency's position that warrants deference, not counsel's position. *E.g., Mead Corp.*, 533 U.S. at 229; *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (interpretations that "lack the force of law * * * do not warrant *Chevron*-style deference"); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) ("[W]e have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position." (citing authorities)).

If section 209(a) were read in isolation, there might be some ambiguity as to its precise meaning in light of the multiple dictionary definitions of the term "standard." Any such ambiguity would, of course, cut against petitioners, given the Court's presumption against preemption. But as shown above, the text, structure, and history of section 209 and related provisions confirm that the courts below properly interpreted that term. *Cf. Deal v. United States*, 508 U.S. 129, 131-32 (1993) (although words often have more than one dictionary meaning, "all but one of the meanings is ordinarily eliminated by context," due to the "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used").

Petitioners argue (Br. 35) that even under a reading of "standard" as a numerical emissions limit, the Fleet Rules are standards because they refer to California's numerical limits. But section 209(a) does not preempt every law that in any

way makes reference to standards; it preempts only "standards." Because the Fleet Rules do not impose numerical emission limits or any other requirement on manufacturers, they are not standards preempted by section 209.

At times, petitioners seem to suggest (Br. 36-44) that other provisions of the Act might preempt the Fleet Rules. Congress does not, however, "hide elephants in mouseholes," changing the fundamental structure of a statutory scheme in ancillary provisions. *Whitman*, 531 U.S. at 468. Because the express preemption provision of section 209(a) does not apply to the Fleet Rules, the Court should not engage in tortured readings of other provisions to find preemption.

### B. The Lower Courts' Distinction Between Manufacturer Controls and Purchaser Controls Is Reasonable and Comports with the Meaning of the Act.

In concluding that section 209(a) does not preempt the Fleet Rules, the lower courts distinguished controls imposed on purchasers from those imposed on manufacturers and distributors. Petitioners argue that this distinction is "illusory," "untenable," and "nonsensical," contending that purchases and sales are simply two sides of the same coin. Pet. Br. 19-20, 25-26.

More than 30 years ago, however, courts recognized that distinguishing between requirements imposed on manufacturers and those imposed on purchasers makes perfect sense when viewed in light of the language and purposes of section 209. As explained in *Allway Taxi, Inc. v. City of New York*, 340 F. Supp. 1120 (S.D.N.Y.), *aff'd*, 468 F.2d 624 (2d Cir. 1972) (per curiam), "both the history and text of the Act show that the [preemption provision] was made not to hamstring localities in their fight against air pollution but to prevent the burden on interstate commerce which would result if, instead of uniform standards, every State and



locality were left free to impose different standards for exhaust emission control devices for the manufacture and sale of new cars." *Id.* at 1124. The *Allway Taxi* court observed that local air quality protections imposed through controls on purchasers "cause only minimal interference with interstate commerce, since they would be directed primarily to intrastate activities and the burden of compliance would be on individual owners and not on manufacturers and distributors." *Id.*

Two decades later, the U.S. Court of Appeals for the District of Columbia Circuit expressly invoked the *Allway Taxi* distinction when it reviewed EPA's rules regarding the definition of "new" nonroad vehicles under the preemption provision set forth in section 209(e)(1). *Engine Mfrs.*, 88 F.3d at 1086. In rejecting an industry challenge to the rules, the court wrote: "The *Allway Taxi* interpretation, postponing state regulation so that the burden of compliance will not fall on the manufacturer, has prevented the definition of 'new motor vehicle' from 'nullifying' the motor vehicle preemption regime. [Industry] has offered no reason to suspect an essentially identical definition of 'new nonroad vehicle' will nullify the nonroad preemption scheme either." *Id.*

Distinguishing between producer and consumer controls also makes good economic sense. Requiring a manufacturer to ensure that a specified portion of its output meets a particular emission standard compels it to produce vehicles without any assurance that market demand will absorb them. Congress quite naturally was concerned with the economic inefficiency of requiring the production of motor vehicles that no one will buy.[4] In contrast, consumer controls like fleet

[4] *See* 42 U.S.C. § 7590(b) (banning federally imposed production mandates except for those under the California pilot test program); 136 Cong. Rec. H2576 (daily ed. May 21, 1990) (statement of Rep. Dingell) ("If we mandate production and mandate certain items, it does not guarantee that the product will be sold.").

purchasing requirements automatically create a market by compelling certain consumers to purchase the motor vehicles being produced, thereby avoiding the burden on industry of producing vehicles no one will buy. Indeed, by directing the States to adopt purchase mandates for private and public fleets in section 246, Congress sought to broaden market penetration of clean fuel vehicles without imposing a production mandate. *See* Clean Fuel Fleet Program, 63 Fed. Reg. 20,159, 20,160 (Apr. 23, 1998) ("Congress intended that the creation of a market for [clean fuel vehicles] would provide an incentive for vehicle manufacturers to produce and sell such vehicles outside California, ultimately resulting in broader market penetration.").[5]

Moreover, consumer controls often benefit the regulated community (*e.g.*, the purchasing fleets) by creating economies of scale that would not otherwise exist. The cost of operating low-emitting, clean fuel vehicles might well be less than the cost of operating conventional vehicles due to reduced fuel costs and the like,[6] but without purchase

[5] *Accord* 42 U.S.C. §§ 13,251, 13,257 (requiring the Secretary of Energy to adopt purchase mandates); 138 Cong. Rec. H11,425 (daily ed. Oct. 5, 1992) (statement of Rep. Bruce) ("This bill would create a market for these fuels by requiring Federal, state and some private fleets to buy increasing levels of alternatively fueled vehicles."); 138 Cong. Rec. H11,439 (daily ed. Oct. 5. 1992) (statement of Rep. Slattery) ("[Demand-side management] programs can not only serve to promote energy efficiency, but can also create and expand markets for new and improved energy equipment, products, and services.").

[6] *See* Emission Standards for Clean-Fuel Vehicles and Engines, 59 Fed. Reg. 50,042, 50,069 (Sept. 30, 1994) (predicting lower operational costs for most light-duty clean fuel vehicles as compared to conventional fuel vehicles); Charles Haddad & Christine Tierney, *FedEx and Brown Are Going Green*, BUS. WK. ONLINE, Aug. 11, 2003, *at* http://www.businessweek.com/magazine/content/03_32/b3845086.htm (reporting that large delivery fleets are switching to hybrids and other clean trucks because they are cheaper to maintain and operate, with fuel cost savings of up to 50 percent).



requirements, retail prices could be prohibitive because so few are produced. And manufacturers might be unwilling to produce and market cleaner vehicles due to the uncertainty of demand. Consumer controls such as fleet purchase requirements create a guaranteed market, drive down production costs through economies of scale, and lead to lower purchase prices for the regulated community. When those reduced purchase costs are combined with lower operational costs, the fleets might well have lower overall costs than they would have in the absence of regulation.[7]

The Fleet Rules at issue combine the best of both worlds. They create market demand for cleaner vehicles, but they simultaneously exempt fleets from compliance where the market fails to provide a sufficient supply of complying vehicles. Thus, neither manufacturers nor purchasers are put at significant risk.

Purchase mandates have an additional advantage over production mandates because the former allow those producers best able to make cleaner vehicles to produce and sell them, as opposed to requiring every manufacturer to do so. In other words, demand-side controls allow the market to sort out which producers can most efficiently produce cleaner vehicles. They do not disrupt any particular manufacturer's production schedule because no manufacturer is required to

[7] *See* Alternative Fuel Transportation Program, 61 Fed. Reg. 10,622, 10,649 (March 14, 1996) (purchase mandate programs create economies of scale that result in decreasing incremental costs); 138 Cong. Rec. H3808 (daily ed. May 27, 1992) (statement of Rep. Synar) ("[I]ncreased Federal and private purchases of [alternative fuel vehicles] mandated in the bill[] will help create the market necessary to encourage vehicle manufacturers to produce these vehicles and allow economies of scale which will reduce production costs."); Nathanael Greene & Vanessa Ward, *Getting the Sticker Price Right: Incentives For Cleaner, More Efficient Vehicles*, 12 PACE ENVTL. L. REV. 91, 94 (1994) (demand-side regulation can make "cleaner, more efficient vehicles more affordable to buy, and * * * more profitable to sell").

sell any vehicles to the covered purchasers. Only those producers who want to tap this market will do so, and the market will adjust the price accordingly.

The distinction between producer and consumer regulation relied on by the courts below is fully consistent with the two cases upon which petitioners rely most heavily: *American Auto. Mfrs. Ass'n v. Cahill*, 152 F.3d 196 (2d Cir. 1998), and *Association of Int'l Auto. Mfrs. v. Commissioner*, 208 F.3d 1 (1st Cir. 2000) (*AIAM*). In both cases, the courts concluded that Zero Emission Vehicle (ZEV) mandates imposed on manufacturers are standards. In fact, in *AIAM* the matter was undisputed. *Id.* at 6 (all parties "agree that the ZEV mandates are standards"). Although petitioners and industry *amici* extract snippets from these opinions in an attempt to bolster their position, neither court had occasion to consider whether purchase mandates imposed on consumers constitute pre-empted standards. As shown above, they do not.

In short, respondents' interpretation of "standard" as meaning numerical emission limits imposed on manufacturers yields a symmetrical, harmonious set of provisions. Under this reading, EPA establishes numerical emission limits and associated testing procedures as required by section 202, California may adopt its own numerical emission standards under section 209(b), and other jurisdictions may adopt California's standards under section 177 (*see* 42 U.S.C. § 7507). And no State or municipality can require a manufacturer to build a "third vehicle." *See id.*

In contrast, petitioners have failed to provide a coherent, unified reading of the Act. For instance, if South Coast's Fleet Rules are "standards" preempted by section 209, one might expect section 202, which authorizes EPA to issue vehicle emission standards, to empower EPA to impose a national fleet purchase program at the federal level (*i.e.*, a federally imposed purchase mandate on private fleet operators, as distinguished from the state-imposed fleet programs



required for specified areas by section 246). Yet there is no evidence that Congress intended EPA to impose nationwide purchase mandates or that EPA has ever considered doing so. And petitioners presumably would oppose any such effort. The reason, of course, is that the term "standard" as used in section 202 has always been understood to refer to quantitative emission limits imposed on manufacturers.

## II. ADOPTION OF PETITIONERS' BROAD READING OF SECTION 209(a) WOULD ERODE ENVIRONMENTAL FEDERALISM AND JEOPARDIZE VITAL STATE AND LOCAL GOVERNMENT INTERESTS.

In recent years, a host of scholars and commentators have hailed the emerging role of state and local governments in the cooperative federalism that drives our nation's efforts to protect public health and the environment. State and local solutions to contemporary environmental problems are especially appropriate to address "diffuse, diverse, and very local causes" of pollution such as motor vehicles. John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENVTL. L. REV. 365, 413 (2002) (recognizing that "[l]ocal responses are inherently flexible and context-specific," thereby enabling local governments "to become useful partners in the state and federal environmental protection systems"); *see also* David L. Markell, *States As Innovators: It's Time for a New Look to Our "Laboratories of Democracy" in the Effort to Improve Our Approach to Environmental Regulation*, 58 ALB. L. REV. 347, 355-57 (1994) (noting the role of state and local governments as central actors in environmental regulation); Richard B. Stewart, *Environmental Quality as a National Good in a Federal State*, 1997 U. CHI. LEGAL F. 199 (1997) (observing that opinion polls indicate that the public wants both the federal government and the States to protect the environment, according a preference to neither).

South Coast's Fleet Rules and similar state and local laws that create demand for environmentally sound technologies are not preempted "standards." Rather, they are precisely the kind of "economic experiment" Congress expects the "laboratories" in our federal scheme to implement. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

As shown below, petitioners' overly expansive reading of section 209(a) would not only undercut cooperative federalism in environmental protection by jeopardizing innovative state and local environmental initiatives, but also impose substantial economic costs as state and local officials endeavor to meet federal air quality standards.

### A. Petitioners' Position Would Threaten Many State and Local Laws That Protect Public Health and the Environment.

Petitioners assert that section 209(a) preempts any state or local law that refers to emissions or engine design criteria related to emissions (Pet. Br. 26), or is "linked" in any other manner to vehicle emissions (*id.* 28). This reading, however, would threaten many laws currently on the books. For example, the Commonwealth of Virginia requires drivers in "HOV" lanes to use either a "high occupancy vehicle" or a low emission vehicle. VA. CODE ANN. §§ 33.1-46.2(6) and 46.2-749.3. These requirements apply during rush hour to major commuter routes in northern Virginia, such as Interstates 66, 95, and 395, and they constitute one of the most successful HOV programs in the country.[8] Virginia's inclusion of low emission vehicles in the program plainly is designed to reduce emissions from new cars by providing an

[8] *See* THE HIGH-OCCUPANCY VEHICLE ENFORCEMENT TASK FORCE, FINAL REPORT (2003), *at* http://www.virginiadot.org/infoservice/resources/FINALHOVTaskForceReport8-15-03.pdf.



incentive to purchase clean vehicles such as the Toyota Prius or Honda Insight.[9] Several other States have similar laws that include low emission vehicles in their HOV programs.[10] Petitioners' reading of section 209(a) as precluding any state or local regulation tied to emission characteristics could invalidate these and other successful incentive programs.[11]

Petitioners' position also could jeopardize state laws that provide tax credits as an incentive to purchase low emission vehicles and alternative fuel vehicles.[12] Respondents' briefs

[9] *Id.* at 4.

[10] *E.g.*, COLO. REV. STAT. § 42-4-1012(2.5); FLA. STAT. § 316.0741(4); GA. CODE. ANN. §§ 32-9-4(a)(4), 40-2-76; UTAH CODE ANN. §§ 41-6-53.5(4)(a)(iii), 41-6-53.5(5). Although federal law requires similar exemptions for certain low emission vehicles as a condition for federal funding (23 U.S.C. § 102(a)(2)), these state laws go beyond those requirements by including low emission vehicles in HOV programs on roads that do not depend on federal funding.

[11] Under petitioners' reading of the Act, inclusion of low emission vehicles in HOV programs would not be rescued from preemption by section 209(d), which preserves for States "the right otherwise to control" the use of motor vehicles. 42 U.S.C. § 7543(d). Because the word "otherwise" retains preemption of all standards, and because petitioners read "standard" as including any state or local law that makes reference to emission limits, their reading would threaten the inclusion of low emission vehicles in HOV programs notwithstanding section 209(d).

Section 249(f)(3) creates a further tension in petitioners' position by authorizing clean fuel vehicle incentives, including HOV exemptions, for States that opt into the California pilot program for clean fuel vehicles. 42 U.S.C. § 7589(f)(3). Consistent with the text and structure of Title II, nowhere does section 249(f)(3) refer to these state incentive laws as "standards." The Solicitor General advises that no State has opted in (U.S. Br. *Am. Cur.* 6 n.2), but the provision still is irreconcilable with petitioners' position that section 209(a) preempts every state law that refers to new vehicle emissions.

[12] *E.g.*, ARIZ. REV. STAT. § 43-1174; ARK. CODE ANN. § 15-4-2104; COLO. REV. STAT. § 39-22-516(2.5); CONN. GEN. STAT. § 12-217i; GA. CODE ANN. § 48-7-40.16(b); LA. REV. STAT. ANN. § 47:38; MD. CODE ANN., TRANSP. § 13-815; MICH. COMP. LAWS § 211.9i; OKLA. STAT. tit.

discuss other incentive programs that also would be threatened by petitioners' reading of section 209(a).

Unlike petitioners, the Solicitor General (U.S. Br. *Am. Cur.* 17 n.4) recognizes that section 209(a) does not apply to at least some incentive programs. *Amici* agree that section 209(a) has no application to incentive programs, and that petitioners' reading of "standard" as including any law that refers to emission limits is patently overbroad. The Solicitor General's position, however, inexplicably turns on whether incentive programs create "barriers to market entry" (*id.*), a reading that finds no support in the language of section 209(a). In contrast, respondents' reading preserves the legitimacy of incentive programs while adhering to the text of section 209 and the Act as a whole.

Petitioners' unduly broad reading of "standard" as any requirement that makes reference to vehicle emissions also might prevent States and local governments from enacting laws governing their own vehicle purchasing decisions, or requiring their agencies and subdivisions to purchase cleaner vehicles. For example, just last year the State of New Mexico enacted a law that requires 75 percent of state government and educational agency motor vehicle purchases to be low emission vehicles. *See* N.M. STAT. ANN. § 13-1B-3. West Virginia imposes alternative fuel fleet purchase requirements on its political subdivisions ranging from 50 to 75 percent, *see* W. VA. CODE § 8-27A-2(b) & (c), and it imposes similar requirements on state agencies. *See id.* § 5A-2A-2(d) & (e). Missouri requires state agencies to ensure that at least 50 percent of agency fleet vehicles can use alternative fuels. *See* MO. ANN. STAT. § 414.410. Many other States have similar laws that could be jeopardized under

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68, § 2357.22, amended by 2003 OKLA. SESS. LAWS Ch. 186; OR. REV. STAT §§ 315.354, 315.356, 316.116, 469.160-.180, 469.185-.225; VA. CODE. ANN. § 58.1-438.1.



petitioners' proposed reading of section 209(a) because they require state agencies and political subdivisions to purchase low emission vehicles.[13] Similar laws at the municipal level also could be called into question.[14]

In contrast to petitioners, the Solicitor General acknowledges that "the State of California may be entitled to place restrictions on the types of new public vehicles that the State and its instrumentalities purchase for their own use." U.S. Br. *Am. Cur.* 29 (quoting *Building & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors*, 507 U.S. 218, 231-32 (1993)); *see also Reeves, Inc. v. Stake*, 447 U.S. 429 (1980). But state and local officials also need the flexibility to impose purchasing controls on private fleets to protect public health and comply with federal law. For instance, the cities of Dallas and Fort Worth are formulating requirements that taxi, limousine, and other fleets operate ultra-low emission vehicles to help meet federal air quality standards by 2007. *See Focus on our Partners*, MOBILITY MATTERS (N. Cent. Texas Council of Gov'ts' Reg. Transp. Council), Fall 2002, at 2, *at* http://www.dfwinfo.com/trans/mobility_matters/mm_fall02.pdf. The City of Dallas advises that it is also considering requirements and bid preferences for city contractors that would reduce emissions by increasing the purchase and use of cleaner vehicles and fuels. These important clean air initiatives might well be preempted by petitioners' broad reading of section 209(a).

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[13] *E.g.*, ARIZ. REV. STAT. § 15-349; IOWA CODE §§ 260C.19A; 262.25A, amended by 2003 Iowa Legis. Serv. 145 (West); KAN. STAT. ANN. § 75-4616(b)(5); LA. REV. STAT. ANN. §§ 33:1418, 39:364; MASS. REGS. CODE tit. 310, § 7.45; MINN. STAT. § 16C.135; NEV. REV. STAT. §§ 486A.010-.180; N.Y. EXEC. LAW § 201-a; OHIO REV. CODE ANN. § 123.011(F); OR. REV. STAT. §§ 267.030, 267.517, amended by 2003 Or. Laws 186; WASH. REV. CODE § 43.19.637.

[14] *E.g.*, SAN FRANCISCO ENV'T CODE § 406.

### B. Petitioners' Position Would Impose Substantial Economic Burdens on State and Local Economies.

The briefs of respondents and other *amici* discuss the premature mortality, cancer risks, permanent lung damage, and other grave health impacts caused by air pollution. But in addition to these serious public health issues, air pollution causes severe economic losses. EPA estimates that smog and other air pollution is responsible for several billion dollars worth of crop damage each year. *See* Final Rule on Ozone Transport Commission, 60 Fed. Reg. 4712, 4713 (Jan. 24, 1995). The repair and cleaning of buildings and painted surfaces damaged by air pollution costs tens of millions of dollars each year. *See* Control of Emissions of Air Pollution from Nonroad Diesel Engines and Fuel, 68 Fed. Reg. 28,328, 28,351 (May 23, 2003). Decreased visibility from haze degrades the natural beauty of national parks, wilderness areas, and local communities, thereby reducing tourism and economic growth. *Id.* at 28,349-51. Air pollution harms our nation's fisheries and tourism industry by contributing to fish kills from low dissolved oxygen and toxic blooms. *Id.* at 28,352. Without the flexibility needed to reduce motor vehicle emissions through innovative measures such as the Fleet Rules, state and local economies will continue to bear these and other substantial costs.

Just as important, petitioners' position would further harm beleaguered state and local economies by shifting more of the compliance burden to small businesses and other stationary sources of air pollution. In 1997 EPA revised the federal air quality standards for ozone and soot. *See Whitman*, 531 U.S. at 463. Data for 1999-2001 show that 111 million people live in areas in non-compliance with the ozone standard, and at least 65 million people live in areas in non-compliance with of the soot standard. *See* 68 Fed. Reg. at 28,334. Unless state



and local officials implement new control strategies such as the Fleet Rules, tens of millions will continue to live in non-attainment areas decades from now. *Id.* at 28,334-35.

Motor vehicles are the largest source of air pollution in the country. *See* Henry A. Waxman, *et al.*, *Cars, Fuels, and Clean Air: A Review of Title II of the Clean Air Act Amendments of 1990*, 21 ENVTL. L. 1947, 1950 (1991). For smog's precursors—oxides of nitrogen and volatile organic compounds (VOCs)—cars and light trucks are projected to account for nearly 40 percent in some cities and 20 percent nationwide. *See* Control of Air Pollution from New Motor Vehicles, 64 Fed. Reg. 26,004, 26,009 (May 13, 1999). In the South Coast Air Basin, on-road motor vehicles contribute more than half of these pollutants. J.A. 80. Even industry sources acknowledge that state and local government air quality officials must devise innovative programs to control pollution and protect public health and the environment. *See, e.g.*, Gary Polakovic, *Smog Woes Back on Horizon*, L.A. TIMES, July 15, 2003, at A1 (quoting an industry representative as saying: "We're running out of time. It's time for the agencies to start thinking outside the box. We need to be more creative and use a different toolbox.").

If section 209(a) were read broadly to preclude state and local governments from implementing creative programs to promote the use of clean vehicles and otherwise reduce vehicle emissions, far more of the compliance burden would fall on small businesses and other stationary sources, with profound economic and social consequences.[15] A small dry cleaner or manufacturing plant, for example, might be forced

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[15] Christopher M. Grengs, *Making the Unseen Seen: Issues and Options in Small Business Regulatory Reform*, 85 MINN. L. REV. 1957, 1975 & n.128 (2001) (discussing the economic impact of the Clean Air Act on small businesses).

to reduce its hours of operation, or shut down altogether.[16] Moreover, businesses are prohibited from locating or expanding in nonattainment areas unless new emissions are offset by reductions elsewhere. *See, e.g.*, 42 U.S.C. §§ 7511a(a)(4), (b)(5), (c)(10), (d)(2), (e)(1). New businesses might bypass nonattainment areas in favor of locating in attainment areas. Whole communities thus could be rendered off-limits for new development, stunting growth and impairing quality of life for residents. If a State fails to implement measures required in nonattainment areas, the costs could be even greater because the Act requires EPA to cut off federal highway funds or impose additional emission offset requirements. 42 U.S.C. § 7509. One analyst estimates that $80 billion in hidden costs could result from non-compliance with federal ozone standards. *See* Susan E. Dudley, *Economic Impact Analyses*, 16 PACE ENVTL. L. REV. 81, 83-84 (1998).

Rural areas have an especially pressing need to control emissions from motor vehicles because emissions from surrounding forests and other vegetation account for a substantial portion of VOC emissions that cannot feasibly be reduced. 64 Fed. Reg. at 26,014. To meet EPA's new ozone standards, these regions must focus largely on smog's other precursor, emissions of oxides of nitrogen, which are produced by high-temperature combustion processes such as those in automobiles. *Id.* These concerns are particularly great in the rural areas of the Southeast, where VOC emissions from vegetation are an important contributor to smog.[17]

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[16] Patricia Ross McCubbin, Michigan v. EPA: *Interstate Ozone Pollution and EPA's "NOx Sip Call,"* 20 ST. LOUIS U. PUB. L. REV. 47, 61-62 (2001) (describing how state implementation plans must make tradeoffs between sources such as motor vehicles and dry cleaners).

[17] *See* U.S. Congress, Office of Technology Assessment, CATCHING OUR BREATH: NEXT STEPS FOR REDUCING URBAN OZONE 4, 98, 101 (1989), *at* http://www.wws.princeton.edu/~ota/disk1/1989/8906_n.html (areas where VOC contributions from vegetation exceed 25% are almost exclusively in the Southeast).



Petitioners display no awareness of, or concern for, the profound economic consequences for state and local governments of their position. Affirmance of the judgment below will promote Congress's intent to ensure that state and local officials have the means necessary to meet the new federal air quality standards in an economically responsible way.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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November 17, 2003

No. 02-1343

NOV 17 2003

IN THE

# Supreme Court of the United States

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ENGINE MANUFACTURERS ASSOCIATION AND
WESTERN STATES PETROLEUM ASSOCIATION,
*Petitioners*,

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, *et al.*,
*Respondents*.

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF OF NATURAL GAS VEHICLE COALITION AND CALIFORNIA NATURAL GAS VEHICLE COALITION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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IN THE

# Supreme Court of the United States

No. 02-1343

ENGINE MANUFACTURERS ASSOCIATION AND WESTERN STATES PETROLEUM ASSOCIATION,
*Petitioners*,

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, *et al.*,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF NATURAL GAS VEHICLE COALITION AND CALIFORNIA NATURAL GAS VEHICLE COALITION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

## INTERESTS OF *AMICI CURIAE*

The Natural Gas Vehicle Coalition ("NGVC") and the California Natural Gas Vehicle Coalition ("CNGVC") respectfully submit this joint brief in accordance with Supreme Court Rule 37.3.[1] NGVC, a nonprofit trade organ-

[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the timely filing of all *amici curiae* briefs in this matter. The parties' letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6 of the Rules of this Court, *amici curiae* state that this brief was not authored in whole or in part by counsel for any party and that no person or entity, other than *amici curiae* and their members, made a monetary contribution to the preparation or submission of this brief.

ization headquartered in Washington, D.C., is a national organization dedicated to the development of a growing, sustainable, and profitable market for vehicles powered by natural gas and hydrogen. NGVC represents more than 180 companies interested in the promotion and use of natural gas and hydrogen as transportation fuels, including: engine, vehicle, and equipment manufacturers; natural gas companies; fleet operators; and service providers. CNGVC, a non-profit trade organization headquartered in Sacramento, California, seeks to promote the continued expansion of the natural gas vehicle market in California, the State that leads the nation in natural gas vehicle usage. The outcome of this action may determine whether the South Coast Air Quality Management District ("SCAQMD" or "South Coast") and other localities and government entities throughout the country may impose reasonable restrictions on commercial and municipal use of fleet vehicles as a critical means to attaining public health air quality standards that also promote the market for cleaner vehicles and fuels.

## SUMMARY OF ARGUMENT

For more than thirty years, and through multiple revisions, Congress has established a framework dependent upon dual federal and state regulation under the Clean Air Act to deliver clean and healthy air to the nation. Under this approach, the federal government establishes nationwide public health air quality standards and the States retain the responsibility for devising the strategies to meet these standards in a timely fashion.

Motor vehicle emissions—and particularly heavy-duty diesel emissions—pose significant air quality challenges, especially in the South Coast region. The continued violation of public health air standards in this region has severe public health consequences. Natural gas vehicles are becoming increasingly prevalent because they are far cleaner than their



conventionally fueled counterparts and they are cost-effective. They are an important part of the air quality solution and lend themselves particularly well to being used in centrally fueled fleets.

The South Coast Air Quality Management District's Fleet Rules foster the deployment of this cleaner technology to vehicles used to deliver municipal and commercial services. The rules are reasonable attainment strategies and a vital part of meeting the region's clean air goals.

The plain language of the Clean Air Act's preemption provision, the structure of that statute, Congress' underlying purpose, and the interpretive case law all support a narrow reading of the Section 209 preemption provision. The Act's preemption is limited to motor vehicle exhaust emissions standards. Congress made clear that such standards are different from other, non-preempted, requirements. Congress sought to strike a balance between the need for a national standard, the unique situation in California, and the needs of areas around the nation to come into attainment with public health air quality standards. The limited effect of the preemption provision is consistent with Congress' other objectives of deferring to California's motor vehicle regulation leadership and the retention of state authority and responsibility for delivering clean air. South Coast's Fleet Rules do not impose new exhaust emissions standards upon manufacturers, but are a reasonable attainment strategy for achieving healthy air. They are not preempted by the Act.

## ARGUMENT

### SECTION 209(A) DOES NOT PREEMPT THE SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT'S FLEET RULES

When Congress legislates in a field traditionally occupied by the States, the Court has consistently "start[ed] with the assumption that the historic police powers of the States were

not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). State law is preempted when Congress intends to "occupy the field" through a pervasive regulatory scheme or when there is an explicit conflict with a federal statute where it is impossible to comply with both the state and federal law. *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 372-73 (2000). And where there is an express preemption provision, no need exists to turn to a theory of implication. *Motor and Equipment Mfrs Ass'n, Inc.* v. *EPA*, 627 F.2d 1095, 1107 (D.C. Cir. 1979) ("MEMA"). The scope of preemption is best assessed "by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby* v. *National Foreign Trade Council*, 530 U.S. at 373. See also *Egelhoff* v. *Egelhoff ex rel. Breiner*, 532 U.S. 141, 147 (2001); *California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997).

### A. The Clean Air Act Contemplates Dual Federal and State Regulation

For more than thirty years, and through multiple revisions, Congress has established a framework dependent upon dual federal and state regulation under the Clean Air Act. Under this approach, the federal government establishes nationwide public health air quality standards and the States retain the responsibility for devising the strategies to meet these standards in a timely fashion. See, *e.g.*, 42 U.S.C. § 7401(a); 42 U.S.C. § 7410; *Chevron, U.S.A., Inc.* v. *Natural Res. Defense Council, Inc.*, 467 U.S. 837, 845-46 (1984); *Train* v. *Natural Res. Defense Council, Inc.*, 421 U.S. 60, 64-65 (1975).

Except in limited areas, Congress expressly provided that States or their political subdivisions had the right to "adopt or enforce any standard or limitation respecting emissions of air



pollutants or any requirement respecting control or abatement of air pollution." 42 U.S.C. § 7416. Indeed,

> [t]he Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of Section 110(a)(2). . . . Thus, so long as the ultimate effect of a State's choice of emissions limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emissions limitations it deems best suited to its particular situation.

*Train*, 421 U.S. at 79. Moreover, States may even submit implementation plans more stringent than federal law requires. *Union Elec. Co.* v. *EPA*, 427 U.S. 246, 249-50 (1976).

Thus, the issue in this case must be assessed against the backdrop of a vital role for States in solving the nation's air pollution problem. Moreover, States can face significant sanctions if they fail to attain the national public health air quality standards in a timely fashion. See, *e.g.*, 42 U.S.C. §§ 7410(m), 7509(a)-(b); *Sierra Club* v. *EPA*, 311 F.3d 853 (7th Cir. 2002); *Sierra Club* v. *EPA*, 294 F.3d 155 (D.C. Cir. 2002); *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *New York State Dep't of Envt'l Conservation*, 17 F.3d 521, 527 (2d Cir. 1994) ("MVMA"). Congress has encouraged States to employ a wide variety of inventive methods to meet their obligations under the Act. A State can implement programs for improved public transit, restrict certain roads and lanes for passenger buses or high occupancy vehicles, and create traffic flow improvement programs that achieve emission reductions. 42 U.S.C. § 7408(f)(1)(A). Likewise, States can create economic incentive programs that include "incentives and requirements to reduce vehicle emissions." 42 U.S.C. § 7511a(g)(4).

### B. Natural Gas Vehicles Provide Important Clean Air Attainment Benefits for States and Localities to Protect Public Health

#### 1. Diesel Exhaust Air Pollution Poses a Significant Public Health Concern in Southern California

The significant and particular challenge posed by automobile emissions has long been recognized. See, *e.g.*, Edmund S. Muskie, *Role of the Federal Government in Air Pollution Control*, 10 Ariz. L. Rev. 17, 19 (1968) ("automobile exhaust was cited [in the 1963 hearings] as responsible for some 50 percent of the national air pollution problem" (quoting Special Senate Subcomm. on Air and Water Pollution, 88th Cong., 2d Sess., Steps Toward Clean Air 3 (Comm. Print 1964))). The significant health concerns posed by motor vehicle pollution, and particularly diesel exhaust, continue today.

California now has a population of over 34 million people, and as of the year 2000 had 23.4 million registered motor vehicles. California Air Resources Board, *California's Air Quality History Key Events* (2003), *available at* http://www.arb.ca.gov/html/brochure/history.htm. Two hundred eighty billion vehicle miles were traveled in the State that year. *Id.* The South Coast Air Basin is the only area of the country classified by the Environmental Protection Agency ("EPA") as an "extreme nonattainment area". JA 80. In that area, on-road motor vehicles contribute more than half of all hydrocarbons, nitrogen oxides, and carbon monoxide to the emissions inventory. JA 80. In 1998, the year for which SCAQMD had the most recent data when considering the Fleet Rules, the area within SCAQMD's jurisdiction exceeded federal standards for ozone, carbon monoxide or particulate matter on a total of 97 days—far more frequently than in any other area of the United States. JA 244-45. A recent study by the University of California Los Angeles



Institute of the Environment found that air pollution is estimated to cause up to 9,000 premature deaths each year in the Los Angeles basin and that smog continues to worsen. ULCA Institute of the Environment, *Southern California Environmental Report Card 2003* 24 (2003).

Diesel emissions are a particular health concern. EPA has found that:

> [t]he pollution emitted by diesel engines contributes greatly to our nation's continuing air quality problems. Even with more stringent heavy-duty highway engine standards set to take effect in 2004, these engines will continue to emit large amounts of nitrogen oxides and particulate matter, both of which contribute to serious public health problems in the United States. These problems include premature mortality, aggravation of respiratory and cardiovascular disease, aggravation of existing asthma, acute respiratory symptoms, chronic bronchitis, and decreased lung function. Numerous studies also link diesel exhaust to increased incidence of lung cancer. We believe that diesel exhaust is likely to be carcinogenic to humans by inhalation and that this cancer hazard exists for occupational and environmental levels of exposure.

66 Fed. Reg. 5001, 5002 (2001); accord Clean Diesel Independent Review Subcomm. of the Clean Air Act Advisory Committee, *Meeting Technology Challenges for the 2007 Heavy-Duty Highway Diesel Rule* (Oct. 2002), *available at* http://www.epa.gov/air/caaac/diesel/finalcdirpreport103002.pdf; EPA, *Health Assessment Document for Diesel Engine Exhaust*, EPA/600/8-90/057F (May 1, 2002), *available at* http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid =29060; 66 Fed. Reg. at 5022-23 (discussing health studies supporting lung cancer findings). Some of these health effects manifest increased hospital admissions and emergency room visits, school absences, work loss days, and restricted activity days. 66 Fed. Reg. at 5006. EPA's judgment as to the likely

carcinogenic effect of diesel exhaust is shared by the World Health Organization, the National Toxicology Program of the U.S. Department of Health and Human Services, the National Institute of Occupational Safety and Health, and the Office of Environmental Health Hazard Assessment of the California Environmental Protection Agency. 66 Fed. Reg. at 5022-23 nn.41-46.

A comprehensive study conducted by SCAQMD—under the direction of a panel of scientists from universities, an environmental group, businesses and other government agencies—found that over 70 percent of cancer risk in the basin results from diesel particulate emissions. JA 256-57, 271. Asthma effects from diesel particulates are of particular concern because of the increasing prevalence of asthma among children and the frequency of childhood school bus exposures. Children are particularly susceptible to environmental effects because they breathe more per pound of body weight than do adults and they have periods of developmental susceptibility. See Executive Order No. 13045, Protection of Children from Environmental Health Risks and Safety Risks (April 21, 1997). Approximately nine million children in the United States under 18 years of age have been diagnosed with asthma. Centers for Disease Control and Prevention, *Summary Health Statistics for U.S. Children: National Health Interview Survey, 2000* 3, Vital and Health Statistics (Oct. 2003).

As EPA's former Administrator has noted, "[e]very day in America, 24 million children travel safely to and from school on 444,000 school buses – that's four billion miles each year, the equivalent of four round-trip visits to Jupiter. That's a lot of driving and a lot of air pollution." EPA Press Release, *Whitman Announces New Partnership to Reduce Children's Exposure to Emissions from Diesel School Buses* (April 7, 2003), *available at* http://www.epa.gov/newsroom/headline2_040703.htm. Researchers from the University of



California Berkeley School of Public Health found that a child riding inside of a diesel school bus may be exposed to as much as four times the level of toxic diesel exhaust as someone riding in a car ahead of it. Natural Resources Defense Council, *No Breathing in the Aisles: Diesel Exhaust Inside School Buses* 8 (Jan. 2001). These exposures pose as much as 23 to 46 times the cancer risk as risk levels considered significant under the Clean Air Act. *Id.* at 11. The introduction of cleaner buses "will result in substantial health benefits including: fewer cases of lower respiratory symptoms in healthy children; fewer cases of upper respiratory and asthma symptoms in asthmatic children; and fewer cases of acute bronchitis." EPA, *Clean School Bus USA Basic Information*, *available at* http://www.epa.gov/otaq/schoolbus/basicinfo.htm (last modified Oct. 22, 2003).

### 2. Natural Gas Vehicles Provide a Clean, Cost Effective, and Increasingly Prevalent Low Pollution Alternative

*Amici* Alliance of Automobile Manufacturers, et. al., ("Alliance Brief") assert without support that the emissions difference between diesel and natural gas vehicles has been "neutralized" and that the Fleet Rules as a result are a "throwback" to an uninformed era. Alliance Br. 3, 10. The data tell a very different story. Natural gas vehicles, such as those encouraged by the Fleet Rules, provide an important strategy for addressing these severe and continuing pollution concerns. Natural gas vehicles can be significantly cleaner on ozone-forming emissions than gasoline vehicles, and even cleaner than those with respect to their diesel counterparts. See, *e.g.*, Dep't of Energy, *Reasons to Buy Alternative Fuel Vehicles*, *at* http://www.ccities.doe.gov/vbg/fleets/about_buying.html (last visited Oct. 21, 2003). Because of the reduced complexity of their emissions control systems due to their inherently clean performance, emissions reductions from natural gas vehicles are more reliable and durable than those

from conventionally-fueled vehicles.[2] Patricia Monahan, *Pollution Report Card: Grading America's School Bus Fleet* 26, Union of Concerned Scientists (2002). They also do not have emissions from the engine itself or during refueling—known as vapor evaporative emissions—which can constitute a significant part of the emissions from gasoline or diesel fueled engines. 59 Fed. Reg. 50,042, 50,070-71 (1994).

A recent study conducted by the University of California at Riverside and Los Angeles found that children riding on diesel buses meeting current requirements had two to five times higher exposures to harmful pollutants than those riding on natural gas buses. California Air Resources Board, *Characterizing The Range Of Children's Pollutant Exposure During School Bus Commutes*, *available at* http://www.arb.ca.gov/research/schoolbus/schoolbus.htm (last visited Oct. 10, 2003). Indeed, the natural gas buses were cleaner than even the best controlled diesels. *Id.* Natural gas school buses emit 90 percent less toxic soot than conventional new diesel-powered buses and are over 98 percent cleaner than older diesel buses. Monahan, *Pollution Report Card: Grading America's School Bus Fleets*, *supra* at x. In considering the Fleet Rules, SCAQMD staff explained that "one diesel refuse truck is estimated to have the same toxicity as up to 74 corresponding natural gas refuse trucks . . . ." JA 130.

While some of these advantages for natural gas vehicles will be lessened when tougher new heavy duty diesel standards promulgated by EPA phase in, these regulations apply only to new engines and it will be many years before the bulk of the diesel vehicles on the road turns over to these cleaner vehicles. 66 Fed. Reg. at 5012. Fleets will not fully comply with that rule until the year 2030. *Id.* at 5014.

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[2] One of California's clean car standards, the AT-PZEV standard, requires manufacturers to certify the emissions durability for 15 years or 150,000 miles. Cal. Code Regs. tit. 13, § 1962(c)(2)(A), (C)-(D) (2003).



Moreover, diesel engine manufacturers, including petitioner EMA's members, have repeatedly raised doubts about their ability to conform with the significantly cleaner standards that will take effect for vehicles manufactured in 2007 and after. See, *e.g.*, *National Petrochemical & Refiners Ass'n* v. *EPA*, 287 F.3d 1130, 1136-1138 (D.C. Cir. 2002); Brief of Petitioner Cummins Inc. at 4, *National Petrochemical & Refineries Ass'n*, 287 F.3d 1130 (D.C. Cir. 2002) (No. 01-1052) ("Technology does not exist today to meet the standards for heavy-duty diesel engines. Moreover, EPA has not identified any path toward development of such technology by 2007. . . .").

Alternative fueled vehicles are becoming increasingly prevalent because they are both a sound environmental and a cost effective choice. While diesel engine manufacturers struggle to meet the upcoming new emissions standards, recent government testing has also shown that some natural gas heavy-duty engines are already twice as clean as the 2007 EPA standards—and cleaner than any diesel engine available today. Dep't of Energy, *The Next Generation Natural Gas Vehicle Activity*, DOE/GO-102003-1779 (Sept. 2003). One natural gas vehicle manufacturer recently completed a purchase contract with the Metropolitan Transit Authority of Los Angeles County to supply between 200 and 600 buses with an engine targeted to achieve 40 percent lower nitrogen oxide emissions than the best equivalent low-emissions diesel engines certified to date. Press Release, Cummins Westport Inc., New Cummins Westport Engine Selected by Los Angeles for up to 600 Buses (July 18, 2003), *available at* http://www.cumminswestport.com/press/index.php. This engine is also expected to be certified for particulate matter at a level that is 80 percent lower than those set by EPA for regulations for transit buses. *Id.* Indeed, the cleanest internal combustion engine light-duty vehicle commercially available at the time of the consideration of the Fleet Rules was a

compressed natural gas powered Honda Civic, which is on average 90 percent cleaner than the average new 2000 model year vehicle. JA 86-87.

The Fleet Rules are readily achievable. There are almost 130,000 natural gas vehicles on the nation's roads today. Leslie Eudy, *Natural Gas in Transit Fleets: A Review of the Transit Experience* 2, National Renewable Energy Laboratory (Feb. 2002). There are 5,000 natural gas transit buses—almost ten percent of the total—currently on the road. American Public Transportation Ass'n, *2001 Transit Vehicle Book* 368, 638 (June 2001). Approximately 22 percent of all new transit bus orders are for natural gas. Eudy, *Natural Gas in Transit Fleets*, *supra*, at 2. School districts in at least 19 states currently use natural gas buses. Monahan, *supra*, at x; NRDC, *No Breathing in the Aisles*, *supra*, at 24. Natural gas transit buses are used in cities from New York to Los Angeles. Monahan, *supra*, at 29. Natural gas vehicles also can be approximately 25 per cent or more cost effective than gasoline or diesel vehicles.[3] Leslie Eudy, *SuperShuttle CNG Fleet Evaluation*, National Renewable Energy Laboratory 13 (Oct. 2000); Monahan, *supra*, at x, 29 (citing Sacramento Regional Transit District and SunLine Transit Agency, *Three Year Comparison of Natural Gas and Diesel Transit Buses* (1999)).

The Court has recognized the significant role that "technology forcing" can play in encouraging the development of new and cost-effective approaches to meeting

[3] Any past concern about the availability of a compressed natural gas fuel infrastructure in Southern California is now misplaced. In testimony before the California Public Utilities Commission, Southern California Gas Company noted that in 2001 there were 160 fueling stations in that region. Prepared Testimony of Michael L. Eaves, Application No. 02-03-047, 2002 LEV Proceeding (March 25, 2002) at 26, 33.



pollution challenges. Justice Breyer reviewed the history of these efforts and found that:

> [t]hose persons, for example, who opposed the 1970 Act's insistence on a 90% reduction in auto emission pollutants, on the ground of excessive cost, saw the development of catalytic converter technology that helped achieve substantial reductions without the economic catastrophe that some had feared.

*Whitman* v. *American Trucking Ass'ns, Inc.*, 531 U.S. 457, 492 (2001) (Breyer, J., concurring).

Congress has also long recognized that, for several reasons, fleets can be particularly cost-effective places to achieve emissions reductions and pioneer new technologies:

> fleets represent a logical spot to introduce clean-fuel vehicles. Fleet operators have central refueling facilities that should simplify the transition to new fuels. They can provide regular professional maintenance for early models. And per vehicle, they drive twice as many miles as vehicles used by the general public. This affords fleet vehicles the best opportunity to take advantage of the fuel savings that certain alternative fuels (particularly natural gas and electricity) may provide.

Henry A. Waxman, et. al., *A Review of Major Provisions: Cars, Fuels and Clean Air: A Review of Title II of the Clean Air Act Amendments of 1990*, 21 Envtl L. 1947, 2002 (1991) (citing Office of Technology Assessment, *Catching Our Breath: Next Steps for Reducing Urban Ozone* 188 (1989)).

Significant incentives for developing alternative fleets have been created by the federal government. These incentives have occurred with, at a minimum, the acquiescence of Congressional appropriators. The Federal Aviation Administration, for instance, has established a $17.3 million grant program pursuant to the Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 47136, to encourage the use

of alternative fuel vehicles in fleets operating at airports, and the Secretary of Transportation provides regular reports to Congress on this program. See Dep't of Transportation, *Report to Congress: Inherently Low-Emission Airport Vehicle Pilot Program* (Nov. 2001), *available at* http://www2.faa.gov/arp/app600/ileav/RTCaq.htm; *FAA Selects 10 Airports for $17.3 Million in Grants for AFVs* 5-6, New Fuels & Vehicles Report (June 7, 2001).

Airport use of alternative fueled vehicles provides a particular demonstration of their benefits. Many airports operate in areas not meeting public health air quality standards, and airports frequently have huge motor vehicle emissions inventories. Los Angeles International Airport, for instance, is the second largest industrial smog source in the Los Angeles Area. Coalition for Clean Air, *Fast Facts* 3, *available at* http://www.coalitionforcleanair.org/cca/facts.htm (last visited Nov. 6, 2003). Airport motor vehicle fleets today can have even more intensive use than Congress recognized in 1990, amounting to ten to twenty times the fuel use of private vehicles. A typical airport shuttle bus travels approximately 60,000 miles per year. Clean Vehicle Education Foundation, *AFVs in the Airport Shuttle Industry: Characterization of a Niche Market* 17, *available at* http://www.ccities.doe.gov/toolkit/pdfs/section3_market.pdf (last visited Nov. 13, 2003).

Dallas/Fort Worth has a draft policy that would require all commercial ground transportation vehicles to consist of 100% Ultra Low Emissions Vehicle certified vehicles or the equivalent by 2007. Dallas/Fort Worth International Airport, *Draft Commercial Ground Transportation Transition Plan to Clean Vehicle Fleets* (Dec. 13, 2002). All taxicabs, luxury sedans, shared ride/shuttles, hotel shuttles, off-airport parking shuttles, and other courtesy vehicles that are added to a company's fleet operating at the Dallas/Fort Worth Airport must be at a minimum LEV or the equivalent after 30 days of the plan's adoption. *Id.* Municipalities likewise have chosen



to contract for services with fleets that have made the commitment to transition to lesser-polluting alternative fuel vehicles. See, *e.g.*, City of Palm Desert Exclusive Franchise Contract to Perform Solid Waste Collection and Recycling Services (July 1, 1995)("CONTRACTOR agrees that a minimum of 50% of new engines for its entire fleet will be alternative fuel vehicles."); Franchise Agreement Between the City of Alameda and Alameda County Industries AR, Inc. for Solid Waste, Recyclable Materials and Organic Materials Services (July 3, 2002)("On the Commencement Date of this Agreement, at a minimum, fifty percent (50%) of the Solid Waste Collection vehicles and fifty percent (50%) of the Recyclable Materials and Organic Materials Collection vehicles used regularly on Collection routes by Contractor shall be Clean Alternative Fuel Vehicles."). For many States and localities, finding these cost-effective fleet-based reductions is an enormously beneficial attainment strategy and—for some regions—a vital part of their pathway towards compliance with the Act's requirements.

### C. The SCAQMD Fleet Rules Are Not A Pre-empted "Standard" Under Section 209(a)

#### 1. The Plain Language of the Clean Air Act Shows that Congress Limited Preemption to the Precise and Narrow Concept of "Standards" Rather than to Any Action Affecting Emissions

Within the context of state obligations to meet the national public health air quality standards under the Act, Congress assigned the duty to the federal government to set national motor vehicle emissions standards, 42 U.S.C. § 7521, but it also reserved for California the ability to develop such standards and allowed other states to follow California's lead. 42 U.S.C. § 7543. Congress was precise in the language that it used to limit state actions in this regard. Except for

vehicles regulated under the California scheme, the Clean Air Act provides, "[n]o State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part." 42 U.S.C. § 7543(a) (emphasis added). Section 209(b) allows California to receive a waiver from EPA to issue standards to control emissions from new motor vehicles provided that the standards are at least as protective, in the aggregate, as the Federal standards. 42 U.S.C. § 7543(b). Any State may then adopt standards that are identical to California's more stringent standards controlling emissions. 42 U.S.C. § 7507.

When arrayed against the carefully crafted limitations on fleet use adopted by South Coast, it is plain that the preemption language of the statute itself is inapplicable. The Fleet Rules only require public agencies, those contracting to provide services on behalf of public agencies, or specific types of licensed private fleets to select among certain lower-emitting vehicles already certified as meeting emissions standards by the California Air Resources Board ("CARB"). See, *e.g.*, JA 27.

Congress limited its preemption in Section 209 to the narrow phrase "standard relating to the control of emissions." Despite the efforts of the petitioners and their *amici* to reach the circumstances here by conflating anything resulting in the control of emissions with the much more particular concept of a "standard", see Pet Br. 25; Alliance Br. 7, the text of the Clean Air Act does not bear them out. Surely the Act would not, for example, go so far as to prevent local transportation agencies from choosing to purchase natural gas transit buses themselves or from deciding upon purchasing smaller, less expensive, and more fuel-efficient vehicles that happen to have lower emissions as well.

The second sentence of Section 209(a) prohibits States from creating conditions precedent to the initial retail sale,



titling, or registration of a new motor vehicle. 42 U.S.C. § 7543(a). The Fleet Rules, however, only require fleet owners to purchase vehicles that are either (1) classified under CARB's regulations as "low emission" vehicles or (2) operate on an alternative fuel. See, *e.g.*, Rule 1191(e) (JA 28). They are "expressly designed to work in tandem with CARB's certification process." JA 219. Therefore, the Fleet Rules do not prevent manufacturers from selling non-low emission vehicles, nor do the Rules require that the manufacturer sell a specified percentage.[4] Rather they require a special class of purchasers to buy vehicles that are already in the market.[5]

Petitioners and *amici* concede that certain "in-use" motor vehicle controls, such as carpool lanes and idling restrictions, are not preempted under the Act. Pet. Br. 5; Alliance Br. 11. But other controls adopted by States and local governments are far more subtle, such as those that provide special clean fuel licenses for use of carpool lanes by alternative fueled vehicles, Va. Code. Ann. § 33.1-46.2 (Michie Supp. 2003), or even the creation of tax incentives or subsidies to encourage the purchase of this type of vehicle. Twenty-nine States have adopted tax and other incentive programs that are designed to create the preference for the purchase of alternative-fueled

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[4] Each Fleet Rule also contains an exception that allows fleet operators to purchase "higher emission" vehicles in the event that no certified alternative fuel vehicle exists. See, *e.g.*, Rule 1191(g) (JA 30).

[5] Nor do the Fleet Rules single out diesel-fueled vehicles because of antipathy toward this particular technology. In passing these provisions, SCAQMD's Governing Board resolved that its staff should "continue to evaluate all engine technologies including conventional diesel . . . and make recommendations for the potential inclusion of these technologies" in the Fleet Rules. SCAQMD Resolution No. 00-XX at 5. Staff are required by this Resolution to return to the Governing Board with proposed amendments in the event that conventionally fueled vehicle engines achieve particular CARB-certified emissions and toxics reductions targets. *Id.* at 7.

vehicles, such as natural gas cars and trucks. See Clean Cities Program, *Department of Energy Compilation, at* http://www.ccities.doe.gov/vbg/progs/laws.cgi (last visited Nov. 6, 2003). Incentives exist in various forms from coast to coast. California has adopted the Carl Moyer Air Quality Standards Attainment Program, which provides funds for the purchase of vehicles that achieve a 30 percent reduction of nitrogen oxide emissions compared to current emissions standards. California Environmental Protection Agency, *The Carl Moyer Memorial Air Quality Standards Attainment Program Guidelines* (2003), *available at* http://www.arb.ca.gov/msprog/moyer/2003moyerguide.pdf. Licenses given by the City of Dallas permit alternative fuel taxicabs and shuttles to be up to seven years old, whereas conventionally fueled vehicles may only be up to five years old. Dallas City Code § 44-7.2.1(a). Washington, D.C. will only contract for school bus transportation services with companies whose fleets have more recent, and therefore lesser polluting, models. Monahan, *supra*, at 17. Petitioners and their *amici's* suggestion that Section 209(a) creates a clear dividing line between a federal sphere pertaining to any and all actions affecting motor vehicles before their initial sale and a limited state sphere of permissible regulation after sale makes no sense in view of these kinds of state and local actions, which are intended to have the effect of reducing emissions, but are not themselves emission standards.

The Section 209 preemption provision is tethered to the substantive content of the authorization for federal motor vehicle emissions standard setting in Section 202. That entire provision is written in terms of narrow numerical standards for motor vehicles. 42 U.S.C. § 7521. Throughout Section 202, Congress uses "standards" to refer to quantitative limits, see 42 U.S.C. § 7521(3)(A), and Section 202(g) requires that regulations contain "standards which provide that such



emissions from a percentage of each manufacturer's sales volume of such vehicles" must not exceed specified levels. 42 U.S.C. § 7521(g).[6]

The text of the Act is plain that the preemption provision is narrowly circumscribed. Congress clarified that, "[n]othing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the *use, operation, or movement* of registered or licensed motor vehicles." 42 U.S.C. § 7543(d)(emphasis added). Nor did Congress limit this clarification to those actions "not affecting emissions," something it plainly could have done. South Coast's Fleet Rules fall within this authorization to regulate use, operation, or movement. Since the Fleet Rules are restrictions on use that apply to commercial or public fleet operators and not directly to the manufacturers, they fall within this protected area of state and local authority.

This limiting construction of Section 209(a) is not changed by Congress' choice in that subsection of the phrase "relating to" the control of emissions. As this Court stated in *Egelhoff*, that while "relating to" indicates that the subject is broadly construed, there is an outer limit—the term cannot be construed to make "preemption turn on infinite connections." 532 U.S. at 147. Similarly, Justice Scalia, joined by Justice Ginsburg, recognized in a concurrence that the phrase is of little moment to preemption analysis because "everything is

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[6] EPA has recently declined to regulate carbon dioxide motor vehicle emissions under section 202, finding in part that it lacks statutory authority to engage in such regulation. 68 Fed. Reg. 62,922 (2003). Since federal authority to grant a motor vehicle emissions waiver to States is premised upon the scope of that authority, and preemption is intended to be "coextensive" with this waiver authority, *MEMA*, 627 F.2d at 1107, preemption arguably would not apply were SCAQMD to have based its regulation on addressing global warming concerns stemming from carbon dioxide emissions.

related to everything else." *Dillingham Constr., N.A., Inc.*, 519 U.S. at 336 (1997) (Scalia, J. concurring); accord *N.Y. State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Inc.*, 514 U.S. 645, 655-56 (1995). Here, it is plain that Congress in its preemption language was addressing narrow vehicle emissions controls rather than any strategy employed by a State which might result in reduced motor vehicle emissions overall.

Moreover, Congress consistently distinguished between this narrow concept of "standards" and other types of requirements, such as "accompanying enforcement procedures," throughout each of the provisions in Section 209. See *City of Chicago* v. *Environmental Defense Fund*, 511 U.S. 328, 338 (1994) (citing *Keene Corp.* v. *United States*, 508 U.S. 200, 208 (1993)) ("It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute and omits it in another."); see also *Bailey* v. *United States*, 516 U.S. 137, 146 (1995)("a legislature is presumed to have used no superfluous words"). Sections 209(a), 209(b)(1)(C), and 209 (e)(2)(B) each differentiate between the phrase "standards" and other types of requirements. 42 U.S.C. §§ 7543(a), 7543(b)(1)(C), and 7543(e)(2)(B). Congress must have intended for the specific term "standard" to refer to a specific type of quantitative requirement respecting emissions with a direct impact on air quality, rather than to a broad, all encompassing term.

The Circuit Courts have consistently adopted this reading of the Act, emphasizing the specificity of the terminology employed by Congress. As the U.S. Court of Appeals for the District of Columbia Circuit has explained:

> [t]hese references [in subsection (a)] to efforts at enforcement would have been unnecessary if Congress intended that "standards" meant any regulation relating to motor vehicle emissions control. . . . Congress intended the word "standards" to mean quantitative levels of emissions rather than regulations involving certification or in-use maintenance restrictions. . . . . The Senate Report on the Air Quality Act of 1967, discussing the preemption provision, mentions "standards" for hydrocarbons, nitrogen oxides, and carbon monoxide in obvious reference to the numerical limitations on those pollutants.



*MEMA*, 627 F.2d 1107, 1112 (D.C. Cir. 1979) (citing S. Rep. No. 90-403, at 32 (1967)); accord *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *DEC*, 79 F.3d 1298, 1305-06 (2d Cir. 1996)(finding no identicality requirement to avoid preemption for mechanisms employed to enforce state adopted standards). See also EPA Opinion on Issues Raised by *Am. Auto. Mfrs. Ass'n* v. *Mass. Dep't of Envtl. Protection*, 163 F.3d 74 (1st Cir. 1998) (Sept. 15, 1999) at n.11 (noting narrow breadth of term "standard" in sections 209 and 177 in contrast to enforcement language, while finding requirements as to numbers of vehicles meeting certain quantitative emissions levels are within the ambit of "standard" under the Act).[7]

### 2. The Text and Structure of Other Clean Air Act Provisions Support Affirming the Lower Courts' Opinions

Other provisions of the statute bear out the limited nature of its preemption. Section 116, which retains state authority other than as limited in Section 209, refers to a much broader set of circumstances than just "standards relating to the control of emissions." It refers to "standards or limitations"

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[7] EPA's Opinion Letter finds that "production requirements" as to the number of vehicles meeting a certain emissions level are within the scope of "emissions standards" under sections 209 and 177 because, among other reasons, an indication of market penetration is central to evaluating feasibility and cost issues under Section 202. These issues are not implicated by the Fleet Rules here, which merely require the selection among already certified models.

as well as to "*any requirement* respecting control or abatement of air pollution." 42 U.S.C. § 7416 (emphasis added). Congress is presumed to intend the use of such starkly different language and could have been so expansive had it intended the preemption provision to have such a broad sweep. See *City of Chicago*, 511 U.S. at 338.[8]

These careful distinctions are preserved throughout the Act. Section 242, which sets forth certain requirements for the clean fuel vehicle program, could not be clearer in distinguishing between "standards"—referring to numerical emissions from motor vehicle exhaust—and "other requirements." Compare 42 U.S.C. § 7582(a) and 42 U.S.C. § 7582(b).

In its regulations setting forth the requirements to implement the Clean Fuel Fleet Program ("CFFP") provisions of Section 246, 42 U.S.C. § 7586, EPA went to great pains to distinguish between production requirements and fleet-based incentives, similar to those at issue here. EPA explained:

> [t]he legislative history of the 1990 amendments to the [Clean Air Act] indicates that, in adopting the [Clean Fuel Fleet Program], Congress made a clear choice between two alternatives: requiring auto manufacturers to produce and sell [Clean Fuel Vehicles], or creating a market for [Clean Fuel Vehicles] and for clean alternative fuels by requiring fleet operators to purchase

[8] Congress included in the Act a variety of other arguably relevant provisions designed to increase the types of tools available for States and industry to achieve cleaner air. See 42 U.S.C. § 7511a(c)(4)-(5) (authorizing States to impose transportation control measures to reduce motor vehicle emissions); 42 U.S.C. § 7586 (authorizing state limitations on certain fleet operators as part of a Clean Fuel Fleet Program). The Clean Fuel Fleet Program provisions of Section 246 are merely a pilot designed to foster and test these approaches.



> such vehicles and operate on such fuels. [Congress] chos[e] the latter option . . . .

63 Fed. Reg. 20,103, 20,104 n.4, 20,105 (1998) (citing *A Legislative History of the Clean Air Act Amendments of 1990*, vol. 1 at 903). The United States, as *amicus*, confuses these issues by attempting to read this history as a prohibition on the Fleet Rules, rather than as a long-standing Congressional acknowledgement of the appropriateness and limited purpose of approaches of this nature.[9] U.S. Br. 20.

Petitioners incorrectly state that Section 246, the CFFP, itself preserves Section 209(a)'s preemption of fleet purchasing requirements. Pet Br. 42-43. Section 246, to be sure, bears some similarity to SCAQMD's actions by requiring States to submit a State implementation plan (SIP) revision establishing a clean-fuel vehicle program if the State is classified as a "covered area" as defined in the section. 42 U.S.C. § 7586. However, Congress did not prohibit a State from using a similar program, on its own initiative, to address air quality problems, nor did it prohibit States from adopting even more stringent provisions. Congress understood that these provisions were not the exclusive realm for addressing and promoting alternative fueled vehicles and that States could choose to implement a similar program even when not required to do so by Section 246.[10] Moreover, Congress has

[9] To the extent that the views of the United States differ with these arguments, the positions presented in its *amicus* brief are litigating positions that have not met the prerequisites for deference to statutory interpretation. See *Geier* v. *American Honda Motor Co., Inc.*, 529 U.S. 861, 911 (2000) (Stevens, J., dissenting) (citing *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000)).

[10] A similar situation exists with regard to incentive programs. Section 249(f)(2) permits States to revise their SIP to provide incentives for the sale or use of clean-fuel vehicles that are produced, sold, and distributed in California. Many States already have incentive programs (financial incentives to purchasers of clean-fuel vehicles, exemptions from high occupancy vehicle requirements, and parking preferences) that Section

authorized other federal actions to secure fleet-based pollution reductions. See, *e.g.*, Energy Policy Act of 1992, 42 U.S.C. § 13201 *et seq.* (requiring fuel providers and state governments to acquire a certain percentage of alternative fueled vehicles and requiring the Department of Energy to evaluate promulgating rules for private and municipal fleets to acquire a certain percentage of alternative fueled vehicles). Therefore, Section 246 signifies nothing more than Congress' recognition that a clean-fuel fleet program is an effective tool to improve air quality in an area.[11]

### 3. Narrow Congressional Concern About a "Third Car" Is Not Implicated by South Coast's Action

Congress' limited purpose in preempting one aspect of motor vehicle regulation should inform the Court's evaluation of these provisions. The District Court below thoroughly reviewed this history. Pet. App. 10a-13a. It shows that Congress recognized that California had special air quality needs justifying a new motor vehicle emissions program

249 lists as permissible. 42 U.S.C. § 7489(f)(3); pp. 14-15, *supra*. If Petitioner and *Amici's* analysis is adopted, such incentive programs used by States independent of the Federal incentive programs would be preempted.

[11] The United States, as *amicus*, argues that Section 249, which establishes the California pilot test program for light-duty trucks and light-duty vehicles, signals that programs like the Fleet Rules are preempted. U.S. Br. 27. However, the California pilot test program is a narrow program that requires automobile manufacturers to produce and sell a certain number of vehicles to the California public. 42 U.S.C. § 7589; see *American Auto. Mfrs. Ass'n v. Cahill*, 973 F. Supp. 288, 300 n.11 (N.D.N.Y. 1997). The provision does not speak to whether a requirement that operators of light-duty and heavy-duty fleets purchase certain low emission vehicles is preempted. Moreover, the Second Circuit has found the preemption reference to "standards" in Section 209 did not extend to the separate authority for Clean Fleets plans. *MVMA*, 17 F.3d at 532.



stricter than the federal program and that the State should be afforded the broadest discretion possible in selecting the best means to protect the health of its citizens. See H.R. Rep. No. 90-728 (1967).[12] Additionally, Congress appreciated that California was a pioneer in setting emissions standards and could continue to serve as a laboratory for further controls. *Engine Mfrs. Ass'n* v. *EPA*, 88 F.3d 1075, 1079-80 (D.C. Cir. 1996); *MEMA*, 627 F.2d at 1110-11 (citing S. Rep. No. 90-403, at 33 (1967)). Indeed, California has been involved in these efforts since 1946 and first developed comprehensive standards in 1957. *MEMA*, 627 F.2d at 1107, 1109 n.26. California's severe air quality challenges continue to this day, with it consistently rated among the areas with the worst ozone problems in the Nation. JA 80.

Congress sought only to avoid the potential confusion and burden that would be created by the requirement that manufacturers or drivers going into new States abide by standards for a "third car" other than the California or federal approaches. David P. Currie, *Motor Vehicle Air Pollution: State Authority and Federal Pre-Emption*, 68 Mich. L. Rev. 1083, 1090-91 (1969-70). The scope of this preemption is limited and was designed to protect against that one purpose—to ensure auto manufacturers would not potentially have to create 50 different classes of cars to meet each State's different emissions control standard. Congress wanted to avoid placing an "undue burden on the automobile manufacturing industry." *MVMA*, 17 F.3d at 527; see also Pet. App. 26a; H.R. Rep. No. 90-728, at 21 (1967) (preemption is "necessary in order to prevent a chaotic situation from developing in interstate commerce in new motor vehicles"); Jan Stevens, *Air Pollution and the Federal System: Responses to Felt Necessities*, 22 Hastings L. J. 661, 674 (1970-71). At

[12] See also Ashley Morris Bale, *The Newest Frontier in Motor Vehicle Emission Control: The Clean Fuel Vehicle*, 15 Va. Envtl. L. J. 213, 224-25 (1995-96).

the same time, Congress sought to strike a balance between the need for a national standard, the unique situation in California, and the needs of areas around the nation to come into attainment with public health air quality standards.

EPA has long recognized—at least until the filing of the United States' brief here—Congress' narrow purpose with respect to preemption of engine regulation. In commenting upon a parallel preemption provision for aircraft engines, Section 233, 42 U.S.C. § 7573, EPA opined by letter that, if a court reviewing a state regulation were to find "no necessary impairment of the operator's ability to operate and test the engine, it [would] seem[] quite likely that [the court] would find the state action not to contravene the Congressional purpose of barring varying state and local regulations which dictate how engines are designed, built and operated." *People of State of California* v. *Dep't of the Navy*, 624 F.2d 885, 888 (9th Cir. 1980), *aff'g* 431 F. Supp. 1271, 1286-87 (N.D. Cal. 1977). The Ninth Circuit in *Dep't of the Navy* affirmed a District Court finding that state regulations affecting emissions from engine test cell housings had "absolutely no effect upon the design, manufacture, and/or operation of aircraft engines," and therefore were not preempted by the Clean Air Act. *Dep't of the* Navy, 431 F. Supp. at 1287.

Similarly, the Fleet Rules do not run afoul of Congressional intent by creating a third vehicle. Rather, they are consistent with the deference Congress provided to California to develop its own strategy for reducing its air pollution and the tools reserved to the States more generally to develop attainment strategies. This Court should be equally reluctant to find that a particular strategy by California exceeds the scope of the State's authority. A measure should only be



found to be preempted if it clearly falls within the scope of Congress's intent to preempt state authority.[13] *Rice*, 331 U.S. at 230.

The effort by petitioners and their *amici* to preclude any "attempt to 'reduce harmful emissions from certain motor vehicle fleets'" goes too far. Brief for The Chamber of Commerce of the United States of America as *Amicus* at 12. See also Pet. Br. 28 ("even when a state law lacks this express reference to emission characteristics . . . , it may nonetheless be preempted if it is linked in some other manner to control of motor vehicle emissions . . . ."). Congress' purpose was to equip States with the tools to meet their air quality obligations while affording predictability to manufacturers. Nowhere is there evidence that Congress intended to completely hamstring state efforts at addressing emissions. Congress was very aware of the distinction it was creating between "standards" and other practices such as use and maintenance and its impact even on the unique problems of the Los Angeles region. See *Hearings on Automotive Air Pollution before the Subcomm. On Air and Water Pollution of the Senate Comm. on Public Works*, 90th Cong., 1st Sess. 115 (1967) (statement of Sen. Baker) ("You don't think the doctrine of Federal preemption would prevent the State of

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[13] Petitioners' invocation of the "third car" prohibition, Pet. Br. 31, is somewhat mystifying, in view of the record below, which indicates that three out of the four major engine manufacturers are already making several different engine models that qualify for purchase under South Coast's Fleet Rules. See JA 221-34. There are currently more than 50 commercially available makes and models of NGVs. See The Natural Gas Vehicle Coalition, *2002 Natural Gas Vehicle Coalition Purchasing Guide, available at* http://www.afdc.doe.gov/pdfs/ngv_guide02.pdf. While *Amici* American Road & Transportation Builders Ass'n et al. identify a number of features of the Fleet Rules that prohibit so heavy a reliance on diesel vehicles for fleets, Br. 24-25, none of these constitute a preference or mandate for an otherwise non-certified vehicle.

California or Los Angeles County from making additional restrictive regulations on the use or the maintenance of vehicles?").

### 4. The Act Permits State and Local Governments to Impose Reasonable Restrictions on Commercial Fleet Activity as an Attainment Strategy

The Clean Air Act's plain language, structure, and purpose all support the retention of authority by SCAQMD to impose reasonable requirements on commercial and municipal fleets as vital parts of an attainment strategy for achieving public health air standards. In a strikingly similar case, the Southern District of New York evaluated emissions-related restrictions on licensed taxi cabs imposed by the New York City Taxi and Limousine Commission. That court explained that:

> both the history and text of the Act show that the . . . preemption section was made not to hamstring localities in their fight against air pollution but to prevent the burden on interstate commerce which would result if, instead of uniform standards, every state and locality were left free to impose different standards for exhaust emission control devices for the manufacture and sale of new cars.

*Allway Taxi, Inc.* v. *City of New York*, 340 F. Supp. 1120, 1124 (S.D.N.Y.), *aff'd.*, 468 F.2d 624 (2d. Cir. 1972). That Court further reasoned that the Clean Air Act does not "preclude a locality from setting its own standards for the licensing of vehicles for commercial use within that locality." *Id.* The "burden of compliance" with such standards is "on individual owners and not on manufacturers and distributors." *Id.*

This same analysis pertains to the Fleet Rules here. As the District Court explained, "[t]he Fleet Rules accept as a given the existing CARB vehicle standards; they merely require fleet operators to choose from among the least polluting of



CARB-certified, available vehicles. The Rules impose no new emission requirement on manufacturers whatsoever. . . ." Pet. App. 21a.

The fleet rules adopted by the SCAQMD are not standards relating to the control of emissions and therefore are a valid exercise of the State's police power.

## CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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No. 02-~~1964~~

Supreme Court U.S.
FILED
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In The
# Supreme Court of the United States

ENGINE MANUFACTURERS ASSOCIATION AND WESTERN STATES PETROLEUM ASSOCIATION,

*Petitioners,*

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, *et al.*,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF OF AMICI CURIAE AMERICAN ACADEMY OF PEDIATRICS (CALIFORNIA DISTRICT); AMERICAN CANCER SOCIETY, CALIFORNIA DIVISION, INC.; AMERICAN LUNG ASSOCIATION; CALIFORNIA MEDICAL ASSOCIATION; PHYSICIANS FOR SOCIAL RESPONSIBILITY; SAN BERNADINO COUNTY MEDICAL SOCIETY; SOCIETY FOR OCCUPATIONAL AND ENVIRONMENTAL HEALTH; AND UNION OF CONCERNED SCIENTISTS IN SUPPORT OF RESPONDENTS

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November 17, 2003

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36 pp

## QUESTION PRESENTED

Does the Clean Air Act preempt local requirements that vehicle fleet owners, including local governments, purchase available vehicles that comply with federally authorized California emission standards?

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## INTEREST OF AMICI CURIAE

The American Academy of Pediatrics (California District); American Cancer Society, California Division, Inc.; American Lung Association; California Medical Association; Physicians for Social Responsibility; San Bernadino County Medical Society; Society for Occupational and Environmental Health; and Union of Concerned Scientists submit this brief as amici curiae.[1] Amici are public health groups concerned about preserving local and state authority to protect breathers from the serious health hazards associated with air pollution.

## INTRODUCTION: AIR POLLUTION'S IMPACT UPON PUBLIC HEALTH

Amici's member doctors and health professionals treat numerous patients suffering from a wide variety of air pollution related illnesses on a daily basis. Air pollution is an especially serious public health hazard in the Los Angeles area, and motor vehicle emissions constitute the largest single source of air pollution both nationally and in Los Angeles. J.A. 80. Vehicles emit air contaminants that scientists associate with cancer, asthma attacks, chronic bronchitis, hospitalization for lung and heart diseases, worsening of emphysema and chronic obstructive pulmonary

[1] The parties to this case have filed a blanket consent to the filing of amicus briefs with the Clerk of the Court. No party to this case has authored any part of this brief or made any monetary contribution toward its preparation and submission.

disease, low birth weights, premature birth, and premature death.[2]

A recent study of thirty toxic air pollutants estimates the cancer risk from those few pollutants at 1,400 per million people in the Los Angeles basin. J.A. 263. Vehicles account for ninety percent of this risk and diesel particulate alone accounts for seventy percent of it. Id. Dozens of studies relate diesel particulate to significant increases in lung cancer.[3]

Vehicle emissions afflict breathers with many other debilitating illnesses. Because they account for more than half of all hydrocarbons, nitrogen oxides, and carbon monoxide in the Los Angeles area, vehicle emissions have thwarted efforts to achieve federal health-based air quality standards for smog (ozone), soot (particulate), and carbon monoxide in the Los Angeles basin, standards adopted to protect the public from extremely widespread

[2] J.A. 254-255; California Air Resources Board (CARB) and Office of Environmental Health Hazard Assessment (OEHHA), *Staff Report: Public Hearing to Consider Amendments to the Ambient Air Quality Standards for Particulate Matter and Sulfates*, 7-48; 7-75-77 (2002), *at* http://www.arb.ca.gov/research/aaqs/std-rs/pm-final/pm-final.htm; Beate Ritz *et al.*, *Ambient Air Pollution and Risk of Birth Defects in Southern California*, 1 Am. J. Epidemiology 17 (2002); David E. Abbey *et al.*, *Chronic Respiratory Symptoms Associated with Estimated Long-Term Ambient Concentrations of Fine Particulates Less Than 2.5 Microns in Aerodynamic Diameter (PM2.5) and Other Air Pollutants*, 5 J. Exposure Analysis & Envtl. Epidemiology 137 (1995).

[3] CARB & OEHHA, *Executive Summary for the Proposed Identification of Diesel Exhaust as a Toxic Air Contaminant* ES-20 (1998), *at* http://www.oehha.ca.gov/air/toxic_contaminants/pdf1/diesel%20exhaust.pdf.



air pollution related disease. J.A. 80, 141.[4] Nationally, scientists associate particulate with tens of thousands of annual deaths and risks of both heart attacks and lung cancer.[5] The California Air Resources Board (CARB) estimate of the number of annual particulate deaths in California exceeds the number of people that die annually in California automobile accidents.[6] CARB also estimates that air pollution causes hundreds of thousands of annual asthma attacks in California, two thousand of which require emergency room visits, usually because the victim has difficulty breathing.[7] Carbon monoxide hinders the transportation of oxygen to human tissue and therefore

[4] Volatile organic compound and nitrogen oxides emissions from vehicles produce both ozone and particulate. National Ambient Air Quality Standards for Particulate Matter: Final Rule, 62 Fed. Reg. 38651, 38652 (1997); J.A. 244, 251. Most hydrocarbons include many volatile organic compounds and some other compounds. *See* J.A. 244 (discussing VOCs and "other hydrocarbon materials").

[5] *See* Joel Schwartz *et al.*, *The Concentration-Response Relationship Between PM(2.5) and Daily Deaths*, 110 Envtl. Health Persp. 1025, 1028 (2002); C.A. Pope III *et al.*, *Lung Cancer, Cardio-Pulmonary Mortality, and Long-Term Exposure to Fine Particulate Air Pollution*, 287 JAMA 1123 (2002); Annette Peters *et al.*, *Increased Particulate Air Pollution and the Triggering of Myocardial Infarction*, 103 Circulation 2810 (2001). More than 98% of the particles emitted from diesel engines are in the fine particle range of ten microns or less, and 92% are less than one micron in diameter. CARB & OEHHA, *Executive Summary*, *supra* at ES-6. These tiny particles can bypass respiratory defense mechanisms and penetrate deep into the lungs.

[6] CARB & OEHHA, *Staff Report*, *supra* at 1-3 (particulate kills 6,500 persons per year); Department of Health Services, Center For Health Statistics, *Death Records* (2001), *at* http://www.applications.dhs.ca.gov/vsq/screen_age_dtha.asp?cnty_cd=AA&YEAR_DATA=2001&Criteria=1&Res_occ=Residence&Birth_Death=Death&stats=1&cod_cd=385 (3,971 traffic deaths).

[7] CARB & OEHHA, *Staff Report*, *supra* at 9-22.

can cause fetal brain damage and pose grave risks for those with heart disease. H.R. Rep. No. 101-490, 148-149, *reprinted in* Senate Committee on Energy and Commerce, A Legislative History of the Clean Air Act Amendments of 1990, at 3172-73 (1993) (1990 Leg. Hist.).

Los Angeles has the worst air quality in the country, primarily because of the vehicle pollution that the rules at issue in this case target. J.A. 245. This air quality poses especially grave risks for children. Air pollution seriously damages children's lungs, impeding normal lung growth, aging young lungs prematurely, and decreasing lung function.[8] A recent study explains that children riding school buses face especially great exposure to pollution from diesel buses and other vehicles. *See* Dennis R. Fitz *et al.*, *Characterizing the Range of School Bus Exposures During Childrens' Commutes* 1 (2003), *at* http://www.arb.ca.gov/research/schoolbus/report.pdf. And children's narrow airways and less developed lungs leave them more susceptible to asthma attacks and other air pollution related afflictions than the general population anyway. *See generally* id. at 1. Air pollution also has especially severe effects upon elderly people with pre-existing heart or lung disease.[9]

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[8] Edward L. Avol *et al.*,, *Respiratory Effects of Relocating to Areas of Differing Air Pollution Levels*, 164 Am. J. Respir. Crit. Care Med. 2067, 2069 (2001); W. James Gauderman *et al.*, *Association between air pollution and lung function growth in Southern California children*, 162 Am. J. Resp. Crit. Care Med. 1383 (2000); Charles G. Plopper *et al.*, *Relationship of Inhaled Ozone Concentration to Acute Tracheobronchial Epithelial Injury, Site-specific Ozone Dose, and Glutathione Depletion in Rhesus Monkeys*, 19 Am. J. Respir. Cell Mol. Biol. 387, 396-99 (1998).

[9] CARB & OEHHA, *Staff Report*, *supra* at 7-55.



The South Coast Air Quality Management District (SCAQMD) developed its fleet purchase requirements precisely because they were needed to "meet . . . federal ambient air quality standards" and address the public health disaster associated with diesel particulate and other vehicular emissions. J.A. 80, 141, 151. Congress passed the Clean Air Act (Act) to encourage local efforts to protect public health in this manner. Since the Act does not expressly preempt the use of local procurement authority as an economic incentive for clean air, this Court should uphold this effort to address grave and widespread health problems.

## SUMMARY OF ARGUMENT

The very purposes of the Act are to protect public health and to encourage local action toward that end. *See* 42 U.S.C. § 7401. The Supremacy Clause prohibits state regulation conflicting with federal law, but does not thwart local initiatives that the national government demands to achieve federal objectives. *See Medtronic v. Lohr*, 518 U.S. 470, 485-86 (1996) (the purpose of Congress is the ultimate touchstone in preemption cases). *See generally* Stephen A. Gardbaum, *The Nature of Preemption*, 79 Cornell L. Rev. 767, 770-71 (1994) (arguing that preemption properly deals only with direct conflicts between federal and state law).

Consistent with these purposes, Congress established a rule broadly preserving state and local authority to protect public health through both "standard[s]" and "requirement[s]." 42 U.S.C. § 7416. This case concerns the scope of an exception to this general rule. That exception

preempts "standard[s] relating to" control of new vehicle emissions. *See* 42 U.S.C. § 7543(a). The petitioning Manufacturers argue that fleet purchase requirements constitute standards relating to emissions control, because *sales restrictions* constitute standards relating to emissions control under the first sentence of section 209(a). Pet. Br. at 25. But that vehicle standards provision does not even reach emissions related sales restrictions. Construing the vehicle standards provision to reach sales restrictions would render the second sentence of section 209(a), which specifically preempts sales restrictions, superfluous. *See* 42 U.S.C. § 7543(a). Because sales restrictions are not "standards relating to" emissions control, neither are fleet purchase requirements.

Since Congress has not clearly stated that it intends to preempt local authority to impose fleet purchase requirements, the Court should preserve that authority. *See Raygor v. Regents University of Minn.*, 534 U.S. 533, 543 (2002). Absent an unmistakably clear statement showing that Congress has confronted the issue, the Court should assume that Congress does not intend to couple a demand for clean air with broad denial of the authority needed to actually protect the public from air pollution. Congress also may not alter the usual state/federal balance by preempting state and local regulation governing the procurement of vehicles delivering traditional municipal services, like garbage collection and public transportation, through vague general language.

Moreover, Congress did not intend to insulate manufacturers from increased demand for vehicles less damaging to peoples' health. Indeed, it clearly encouraged economic incentives addressing vehicle emissions. This Court has held that programs only influencing the



economic incentives facing beneficiaries of preemption do not "relate to" employee benefit plans. *See, e.g., New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins.*, 514 U.S. 645, 658-59 (1995) (unanimous opinion). Because the Clean Air Act specifically encourages economic incentive programs, this precedent shows that fleet purchase rules, which likewise simply change the economic incentives facing preemption beneficiaries, do not constitute standards relating to the control of new vehicle emissions. The Act's plain language, purpose, and structure support retention of local procurement authority as a source of economic incentives.

## ARGUMENT

### I. Because *Sales Restrictions* are Not "Standards Relating to" Emissions Control, Section 209 Does Not Preempt Fleet Purchase Requirements.

It is a "cardinal rule of construction" that courts interpret statutes as a whole, harmonizing their provisions so that no word or provision becomes superfluous. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001). In this case, simply harmonizing the two sentences of section 209(a) shows that the Act does not preempt fleet purchase requirements.

Congress partially preempted only direct regulation of new vehicle emissions control and one form of indirect regulation. The first sentence of section 209(a) prohibits direct regulation of the manufacturing process, while the second sentence prohibits indirect regulation through a sales restriction. *See* 42 U.S.C. § 7543(a). Absent the second sentence, states might refuse to title a vehicle unless the state approved its emissions control system. *See*

id. The second sentence, not the first, prohibits states from making a "certification ... relating to" new vehicle emissions control a "condition precedent to the ... sale, titling or registration" of a vehicle. Id.

Section 209(a)'s specific express preemption of sales restrictions bars an inference that fleet purchase requirements are preempted. The exceedingly specific language of the second sentence simply does not mention purchase requirements. *See* id. Section 209(a)'s second sentence expressly preempts certain sales restrictions, not purchase requirements.

Nor do fleet purchase requirements constitute "standards relating" to new vehicle emissions control under section 209(a)'s first sentence. *See* id. The petitioning Manufacturers argue that fleet purchase requirements constitute "standards relating to" emissions control, because purchase is the flip side of sales (no purchase, no sale). Pet. Br. at 25. But *sales restrictions* do not constitute "standards relating" to emissions control under section 209(a)'s first sentence. If section 209's first sentence reached sales restrictions that indirectly cause manufacturers to reduce emissions, there would be no need for the second sentence. *Cf. Hohn v. United States*, 524 U.S. 236, 249 (1998) (disfavoring construction of one provision that renders another superfluous). Congress added the second sentence, precisely because the first sentence only reached direct regulation.

Because sales restrictions are not "standards relating to" emissions control under section 209's first sentence, neither are fleet purchase requirements. Section 209(a) provides no literal support for the Manufacturers' argument, because the very specific second sentence, which prohibits



sales restrictions, does not reach purchase requirements, and the first sentence's potentially ambiguous language must be read to apply only to direct regulation of emissions control in order to avoid making the second sentence superfluous.

## II. Congress Did Not Permit Implied Preemption.

Manufacturers' argument has no literal basis. Rather, it involves a plea to imply preemption of purchase requirements in the face of a statutory provision retaining state authority, except in the case of "certain" rules expressly preempted in section 209(a). *See* 42 U.S.C. § 7416.

Section 209(d) shows that Congress did not intend to reach all programs addressing vehicle emissions, because it preserves state authority to enact vehicle inspection and maintenance programs and restrict driving in order to reduce emissions. 42 U.S.C. § 7543(d). *See also* 42 U.S.C. §§ 7408(f), 7511a(b)(4), 7544. Congress added this provision as part of a general effort to resolve uncertainty about the scope of state authority to regulate vehicle pollution to avoid litigation. H.R. Rep. No. 90-728, at 21, *reprinted in* 1967 U.S.C.C.A.N. 1938, 1956. Section 209(d) states that "nothing in this *part*" preempts state regulation of licensed vehicles. Id. (emphasis added). The term "this part" refers part A of subchapter two of the Act, which addresses "motor vehicle emission and fuel standards." *See* 42 U.S.C. §§ 7521-7554. This language shows that federal fuel and vehicle regulation should not give rise to field preemption or any other form of implied preemption.

Congress affirmed this decision not to risk the uncertainty of implied preemption by expressly preserving

state authority in section 116. *See* 42 U.S.C. § 7416; Kenneth Starr *et al.*, *The Law of Preemption: A Report of the Appellate Judges Conference American Bar Association*, 54-55 & n. 241 (1991) (citing section 116 as an example of detailed lawmaking that makes implied preemption inappropriate). *Cf. Cipollone v. Ligett Group, Inc.*, 505 U.S. 504, 517 (1992) (matters beyond the reach of expression preemption clause are not preempted); *Geier v. American Honda Motor Co.*, 529 U.S. 861, 874-75 (2000) (implying preemption of tort suits conflicting with statutory goal of advancing safety). In keeping with the Act's health protective purpose, section 116 broadly preserves state authority to enact "any" requirements or standards more stringent than federal rules, while broadly preempting any authority to adopt less stringent law. 42 U.S.C. § 7416. Thus, Congress preserved authority to impose fleet purchase requirements.

Section 209(d) does not indicate that Congress believed that section 209(a) had a broad enough reach to preempt state authority to regulate titled vehicles. When Congress thought that section 209 preemption reached authority it wanted to preserve, it expressly exempted that authority from preemption under section 209 with a specific reference to that section. *See, e.g.*, 42 U.S.C. §§ 7543(b), 7507 (allowing the nation's strictest regulator, California, to regulate vehicle emissions and other states to copy strict California standards notwithstanding preemption under section 209(a)). *See also American Auto. Mfrs. Ass'n v. Mass. Dep't Envtl. Prot.*, 163 F.3d 74, 78 (1st Cir. 1998) (EPA granted a waiver in 1993 for California standards requiring that 2% of vehicles be zero emission vehicles). The absence of this specific reference in section 209(d) confirms the narrowness of section 209(a) preemption. In



keeping with the Act's overall purpose, the statute strictly limits any exceptions to the general rule preserving state authority to enact programs protecting public health. *Cf. Geier*, 529 U.S. at 867-68 (reading a preemption clause narrowly to harmonize it with a saving clause).

## III. Local Government May Enact Fleet Procurement Requirements, Since Congress Did Not Clearly State that it Intends to Preempt Such Requirements.

Even if the Act's plain language did not settle this case in SCAQMD's favor, the strong presumption against preemption appropriate here requires retention of local authority. This presumption would resolve any ambiguity in section 209, including any ambiguity about the meaning of the term "standards," and the phrase "standards relating to" emissions control. This Court's recent preemption jurisprudence recognizes that the words "relate to" cannot resolve preemption issues in isolation, since "everything is related to everything else." *California Div. of Labor Standards Enforcement v. Dillingham*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring) (citations omitted). *Accord Travelers*, 514 U.S. at 655 (unanimous opinion). That observation applies fully to the Clean Air Act. Indeed, under the Act, one could argue that even regulation of factory emissions is "related to" new vehicle emissions, since less reductions from factories implies a greater need for more vehicle emission reductions to meet the Act's health protective goals. *See, e.g.*, 42 U.S.C. §§ 7521(i)(2) (requiring EPA consideration of the need for more reductions in establishing "tier two" vehicle standards); 7521(l) (requiring vehicle toxics regulation if needed). And all state demonstrations that their air pollution control

programs provide for attainment of ambient air quality standards, which the Act requires, must refer to federal or California vehicle emission standards in order to project emission reduction budgets. *See* 42 U.S.C. § 7410(a). *See, e.g.*, Approval and Promulgation of Implementation Plans, Texas, Houston/Galveston Ozone Nonattainment Area, 66 Fed. Reg. 35903, 35904 (2001) (describing a reference to the federal vehicle emissions control program in a state implementation plan). So, consistency with Congressional intent with respect to the Clean Air Act requires a narrower approach than that sometimes employed in cases interpreting the Employee Retirement Income Security Act of 1974 (ERISA). *Cf. Shaw v. Delta Airlines*, 463 U.S. 85, 97 (1982) (explicit reference to an ERISA plan justifies preemption, *"unless there is good reason to believe that Congress intended" otherwise*) (emphasis added). Because preemption in this case would frustrate achievement of the Act's health protection goal, deny local government authority needed to meet federal demands, and impinge on local authority to establish procurement policies for vehicles delivering traditional municipal services, preemption requires a clear statement expressly limiting fleet purchase requirements. The Act contains no such statement.

### A. This Court Presumes that Congress Does Not Intend to Preempt Local Authority to Protect Public Health, Even When Congress Only Relies Upon Federal Authority to Achieve its Goals.

The mere fact that control of air pollution clearly lies within the police power of the state suffices to trigger a presumption against preemption. *See Huron Portland*



*Cement v. Detroit*, 362 U.S. 440, 442 (1960) (local air pollution ordinance involves exercise of the "most traditional concept of . . . the police power"); *Building and Constr. Trades Council of Metro. Dist. v. Associated Builders and Contractors*, 507 U.S. 218, 224 (1993) (applying the presumption against preemption to the relatively new field of labor law). The Court declines to invoke this presumption only in areas that have a very long history of Congressional legislation and usually some constitutional doubt about the legitimacy of state regulation. *See, e.g., Crosby v. National Foreign Trade Council*, 530 U.S. 363, 375-76 (2000) (President's foreign affairs power "controls the issue" of whether a federal statute preempts state sanctions imposed upon Burma); *United States v. Locke*, 529 U.S. 89, 108 (2000) (declining to apply presumption against preemption, because Congress has regulated maritime affairs from the "beginning of the Republic" and doubt exists about the validity of concurrent state power in this area). Neither factor is present here. This presumption informs interpretation of express preemption provisions, just as it informs implied preemption. *Medtronic*, 518 U.S. at 485. And the presumption forbids preemption "unless that was the clear and manifest purpose of Congress." *Travelers*, 514 U.S. at 655 (provision preempting law that relates to an employee benefit plan construed narrowly to avoid reading the "clear and manifest" intent rule out of the law); *Dillingham*, 519 U.S. at 325.

### B. Because Retention of Local Authority Serves the Act's Purpose of Protecting Public Health, Preemption Requires a Clear Statement.

Section 101(b) of the Act explicitly establishes its purposes. The elected government declared a single overarching purpose, to preserve and "enhance" air quality in order to protect public health and welfare. *See* 42 U.S.C. § 7401(b)(1); *Union Electric v. EPA*, 427 U.S. 246, 266 (1976) (prompt attainment of air quality standards is the Act's "primary purpose"). It then explicitly set out additional purposes that serve this larger purpose, most importantly, encouragement of "regional air pollution prevention and control programs" like those of the SCAQMD. 42 U.S.C. § 7401(b)(4); *Huron*, 362 U.S. at 445 (citing Congressional policy, established in the 1955 Clean Air Act, of protecting local government rights to control air pollution). *See also* 42 U.S.C. § 7504 (requiring state decisions about which functions local officials will perform).

The purposes set out in section 101(b) constitute the sole purposes of the Act. *See Allied Stores v. Bowers*, 358 U.S. 522, 530 (1959) (when a statute expressly declares its purpose there is "no room to conceive of any other purpose . . ."); *Cipollone*, 505 U.S. at 514 (deriving the Federal Cigarette Labeling and Advertising Act's purpose from explicit statutory statements of purpose). Congress pursued its health protection goal with rare single-mindedness. *See Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 471 (2001) (EPA may not consider cost in setting national ambient air quality standards); *Union Electric*, 427 U.S. at 256 (EPA may not consider cost and feasability in deciding whether to approve state implementation plans); *Train v. Natural Resources Defense Council*, 421 U.S. 60, 64 (1975) (Congress decided to "take a stick to the states" to get



them to achieve clean air). It only took into account considerations competing with the statutory health protection goal in ways that would not interfere substantially with that goal. *See, e.g., Union Electric*, 427 U.S. at 266 (states may consider cost and feasability when such consideration does not interfere with attainment of air quality standards). *Cf. Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 851 (1984) (describing economic considerations as a purpose of one of the Act's sections, but not of the Act as a whole).

When local authority aids achievement of federal objectives, the Court should preserve local authority absent a clear statement precluding its exercise. The Court invokes a presumption against preemption even where some tension exists between state law and federal goals. When local authority stands as an aid, not an obstacle, to the accomplishment of federal purposes, normal preemption principles make the presumption especially powerful. *See Pharmaceutical Research and Mfrs. of America v. Walsh*, 123 S. Ct. 1855, 1869 (2003) (presumption against preemption has "special force" when the two government pursue common purposes). *Cf. Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (preemption appropriate when state law stands as an obstacle to achievement of federal purposes).

In interpreting a clause preempting law "related to" employee benefit plans, this Court has recognized that statutory purpose guides determination of preemption's scope. *See Dillingham*, 519 U.S. at 325 (1997); *Travelers*, 514 U.S. at 656. Purpose is always the "ultimate touchstone" of preemption analysis. *See Cipollone*, 505 U.S. at 516. But the potential expansiveness of the phrase "related to" in isolation leaves a court rudderless unless it

tethers its interpretation to the statute's stated overarching purpose. *See Dillingham*, 519 U.S. at 325 (objectives of the statute become guide to the scope of preemption because "uncritical literalism" offers "scant utility" in discerning intent behind a provision preempting law that relates to employee benefit plans); *Travelers*, 514 U.S. at 656 (we must look into the objectives of the statute, because the text is unhelpful).

The principle that courts should, if fairly possible, construe a statute to serve its purpose supports retention of authority to regulate local fleet procurement. *See Medtronic*, 518 U.S. at 490-91 (declining to read an ambiguous preemption clause as undercutting the statutory purpose of protecting public health). Because attainment of air quality standards is impossible in many jurisdictions without significant state and local efforts to address vehicle emissions, the Court should interpret section 209(a) narrowly. Because the SCAQMD's fleet program serves the Act's goal of protecting public health, only a specific statement can make Congressional intent to preempt the program "clear and manifest." *Cf. Geier*, 529 U.S. at 874-75 (implying preemption of tort suits conflicting with the statutory goal of advancing safety).

### C. When Congress Relies Upon State and Local Authority as the Primary Means of Meeting a Federal Goal, Preemption Requires a Clear Statement.

This Court should not assume that Congress broadly preempted local authority to comply with a cooperative federalism scheme absent a clear statement showing that Congress intends such an incongruous result. It is extremely unlikely that Congress would vest states with



the primary responsibility to meet air quality standards, *Train*, 421 U.S. at 64 (1975), while simultaneously depriving them of the authority needed to achieve these vital goals. *See Travelers*, 514 U.S. at 667 (rejecting broad interpretation of preemption that would leave States "without ... authority to do just what Congress was expressly trying to induce them to do"). Strict application of the clear statement requirement assures that Congress has faced the issue of demanding state compliance with the federal health protection goal, while denying states the necessary tools. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (clear statement rule assures that Congress faces critical issues "affecting the federal balance") (citation omitted).

Preemption of local authority to meet federal goals through vague "relating to" language undermines democratic accountability. Concern about democratic accountability underlay this Court's holding in *New York v. United States* that Congress may not commandeer state enforcement of federal regulation. 505 U.S. 144, 161 (1992). If the federal government directs state officials to regulate, "state officials ... bear the brunt of public disapproval" of regulation, even though federal officials deserve the blame. *Id.* at 169. Thus, public health groups concerned about federally coerced local hazardous waste siting would blame local officials, rather than the federal officials really responsible. *See id.* at 149, 169.

This political accountability concern even more strongly disfavors reading a vague preemption clause as broadly limiting local authority under a statute that requires that authority's exercise to meet federal goals. This denial of authority effectively coerces state officials into not acting, while forcing them to take the blame for

not meeting popular goals that the federal government has encouraged them to meet. This commandeering of inaction under a cooperative federalism statute diminishes political accountability more thoroughly than openly requiring local regulatory action does. For this commandeering of inaction not only shifts the blame for failures to disempowered local officials, but also allows Congressional representatives to take undeserved credit for demanding that local government meet popular environmental goals. *Cf.* Starr, *supra* at 48 (judges preempting state law without "explicit Congressional guidance . . . assume a legislative role without accepting legislative responsibility."). Unless the Court requires Congress to make preemption decisions in "full view of the public", *New York*, 505 U.S. at 168, *i.e.* through a clear statement, preemption of authority under a cooperative federalism statute diminishes local and federal accountability.

A clear statement requirement also allows states to "knowingly" decide whether to meet the conditions the federal government has set in the Act for earning federal highway funds. *Cf. South Dakota v. Dole*, 483 U.S. 203, 207 (1987). In order to encourage states to protect public health, the Act requires a cutoff of highway funds if states fail to enact regulatory programs sufficient to meet national ambient air quality standards. *See* 42 U.S.C. § 7509. If the states (and their subdivisions) have doubts about the scope of their regulatory authority, they cannot know what programs they may rely upon to avoid the cutoff. Thus, the policy behind the rule that conditions on the receipt of federal funds must be unambiguous also supports the clear statement requirement in the context of cooperative federalism. *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 24 (1981).



### D. Congress May Not Usurp Local Policy Governing Procurement of Vehicles Delivering Traditional Municipal Services Without a Clear Statement.

Amici believe that their tax dollars should not fund purchases of relatively dirty vehicles further endangering their patients' health, when cleaner vehicles are available. Most of the rules at issue here apply to governmental and privately owned fleets used to deliver traditional municipal services, such as bus service and garbage collection. *See* J.A. 46, 52, 66, 80; McQuillin, *Municipal Corporations* §§ 29.32, text accompanying nn. 41 & 45 (1999) *Cf. Associated Builders*, 507 U.S. at 220 (describing government agency charged by legislature with supplying water, sewage collection, and waste treatment). The interpretation of law that Manufacturers and the Solicitor General seek preempts voluntary local decisions to purchase clean vehicles, since the elected local officials who are the local government instruct unelected bureaucrats to follow the voluntary decisions of the elected government through enactment of laws.

To deliver services, local governments must use their traditional procurement authority to obtain needed vehicles or contract for services from vehicle fleet owners. *See generally* McQuillin, *supra* § 28.01. *Cf. Associated Builders*, 507 U.S. at 221 (regional agency contracts with private firm for public purpose of cleaning up Boston harbor); *Hughes v. Alexandria Scrap*, 426 U.S. 794, 796-97 (1976) (state licensed wreckers to scrap vehicles to address problem of insufficient recycling of junked cars). Local and state governments usually provide a legal framework for purchases of vehicles to make sure that the purchased vehicles are safe and fit for their public purposes. *See, e.g.*, McQuillin, *supra* §§ 24.682, 24.698, 24.709, 29.28-.29,

29.52 (competitive bidding and duties of bus franchisees to use safe equipment). *Cf. Atkin v. Kansas*, 191 U.S. 207 (1903) (upholding state labor law applicable to private contractors building streets under a contract with a municipality). In Los Angeles, the emissions from the vehicles make them unsafe and therefore unfit. *See, e.g.*, Fitz, School Bus Study, *supra*. *Cf. Hughes*, 426 U.S. at 809-810 (state acts as a market participant when it offers a bounty to get local licensed processors to scrap cars as an environmental measure). The fleet purchase rules limit municipal use of taxpayer money to increase health hazards.

A federal usurpation of traditional government procurement authority, including the right to enact laws establishing the policies governing procurement (like the fleet purchase requirements), would alter the normal balance between federal and local law. *Cf. Perkins v. Lukens Steel*, 310 U.S. 113, 127-29, 132 (1940) (business has no standing to challenge a federal prevailing wage law, because government enjoys "unrestricted power" to establish its own procurement policy). The federal government can only usurp state and local authority to regulate procurement of vehicles performing traditional municipal functions through an "unmistakably clear" statement that shows that it has faced the relevant issue. *See Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991).

The *Gregory* Court relied upon the rule that preemption requires "clear and manifest" Congressional intent to preempt state law to justify its extension of the clear statement requirement beyond the realm of sovereign immunity waivers. *Id.* at 461 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). When Congress intends to preempt historic state powers or legislate to



"affect the federal balance" in "traditionally sensitive" areas of local power, it must make its intention "unmistakably clear in the language of the statute."[10] *Raygor*, 534 U.S. at 543 (citations omitted). *See also* Starr, *supra* at 40-56 (explaining why the clear statement approach to preemption is appropriate). Absent a clear statement, the Court should assume that Congress does not intend to undermine mandatory local protection of public health by preempting fleet purchase requirements.

### E. Congress Has Not Clearly Stated that it Intends to Preempt Local Fleet Purchase Requirements.

While section 209(a) clearly reaches vehicle emission standards and certain sales restrictions, it does not clearly state that it reaches regulation of fleet procurement. *Cf. Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 607 (1991) ("mere silence" in the context of a statute authorizing state regulation of pesticides cannot show clear and manifest intent to preempt local authority); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 245-46 (1985) (general language authorizing suits against "any recipient of Federal assistance" does not authorize suits against state governments receiving federal funds). In light of the evidence that the term "standards" has a narrow meaning under the Act, the indisputable ambiguity of the words "relating to" in isolation, and the overwhelming structural evidence that section 209(a)'s first sentence only reaches

[10] Of course, these concerns apply fully when local government exercises its authority, which derives from that of the state. *See Printz v. United States*, 521 U.S. 898, 931 n. 15 (1997).

vehicle emission standards, it just cannot be said that Congress had a "clear and manifest" intent to preempt authority to use fleet procurement as an economic incentive for clean air. *Cf. City of Columbus v. Ours Garage and Wrecker Service*, 536 U.S. 424, 432-34 (2002) (finding no clear and manifest intention to preempt local authority, even when normal principles of statutory construction would support preemption).

## IV. Congress Did Not Protect Manufacturers from the Influence of Economic Incentive Programs, Like Fleet Purchase Programs.

This Court has rejected the notion that programs merely influencing the economic incentives facing the beneficiaries of federal preemption fall within the scope of preemption in its ERISA jurisprudence. Since Congress called on states to enact economic incentive programs to influence vehicle emissions, section 209 does not preempt fleet purchase programs.

### A. Congress Intended to Encourage Economic Incentives Programs, Including Fleet Purchase Programs.

The Act encourages states to create "economic incentives and requirements to reduce vehicle emissions." 42 U.S.C. §§ 7408(f), 7511a(g)(4)(A). That is precisely what fleet purchase programs do. *Accord* Clean Fuel Fleet Program, 63 Fed. Reg. 20103, 20104 (1998); 136 Cong. Rec. 6463 (1990), *reprinted in* 4 1990 Leg. Hist. at 7209 (1993) (statement of Senator Levin). They create inducements to sell clean vehicles by providing a pool of customers who will buy them, if they are available. Manufacturers have



no obligation to sell them a single vehicle. *See* 136 Cong. Rec. 6463 (fleet program avoids "mandated production and sale"). *Cf. Egelhoff v. Egelhoff*, 532 U.S. 141, 147 (2001) (preempted state law binds ERISA plan administrators to a particular set of rules for determining plan beneficiaries). But they can make more money if they do. Creation of a market creates an economic incentive to sell clean vehicles, not a standard regulating vehicle emissions.

This encouragement of economic incentives forms part of a Congressional policy to use California as a "laboratory for innovation." *Motor & Equipment Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1111 (D.C. Cir. 1979). *Cf. Travelers*, 514 U.S. at 667-68 n. 6 (Congressional intention to encourage state experimentation supports finding that ERISA rate regulation does not reach state health care cost controls). Our federalism contemplates local experimentation as a means of trying to solve pressing social problems. *See New State Ice v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *Smith v. Robbins*, 528 U.S. 259, 272 (2000). The SCAQMD's fleet purchase program constitutes an innovation creatively using economic incentives to address a critical public health problem.

This use of economic incentive measures also serves the Act's policy of encouraging the advance of clean technology, albeit by means other than "forcing" technology through command and control standards. *Cf. Union Electric*, 427 U.S. at 257-59 (discussing Congressional intent to force the development of technology that appeared infeasible). Command and control regulation often fails to encourage innovation. By contrast, consumer demand provides a continuous incentive for many types of innovation, but not for innovations delivering public goods like environmental protection. *See* David M. Driesen, *The Economic Dynamics*

*of Environmental Law* 93, 98-105 (2003). Local experimentation with incentives to encourage production of cleaner vehicles through consumer demand, rather than mandatory regulation of manufacturing processes, may aid encouragement of innovation advancing the state of the art. 136 Cong. Rec. 4138 (1990), *reprinted in* 4 1990 Leg. Hist. at 5778 (statement of Senator Wirth).[11] Such innovation is important in the Los Angeles area, because land use patterns built around the automobile and topography have produced air quality problems that resist conventional solutions. Innovation can increase national capacity to address intractable environmental problems.

### B. Economic Incentive Programs Fall Outside the Scope of Preemption Under this Court's Cases.

This Court has held that a clause preempting laws that "relate to ... employee benefit plans," 29 U.S.C. § 1144(a), does not reach laws that simply provide economic incentives. In *Travelers*, a unanimous Court upheld a New York law that required hospitals to charge private health insurance plans more for hospital care than Blue Cross/Blue Shield plans. 514 U.S. at 649. The Court recognized that this economic incentive has an "economic effect on choices" ERISA plan administrators make about which type of insurance to purchase. *Id.* at 659. But it

[11] Senator Wirth offered his comments with respect to an Amendment that failed, but included requirements similar in form to the fleet purchase requirements passed in the 1990 Amendments and in the SCAQMD fleet purchase rules – requirements that impose purchase requirements on fleet owners.



distinguished "indirect economic influence" from preempted mandates binding administrators to a particular choice. *Id.* A unanimous Court explained that the prior cases finding preemption under ERISA "**mandated** employee benefit structures or their administration." *Id.* at 658 (emphasis added). Thus, *Travelers* held that even under the older ERISA cases, economic incentive programs do not "relate to" employee benefit plans.

This distinction between mandates and economic incentive programs likewise controlled *Dillingham*, 519 U.S. 316. That decision upheld a California law allowing contractors to pay apprentices in qualified apprentice programs a lower wage than the prevailing wage otherwise required. *Id.* at 319. Even though an apprenticeship program financed through a separate fund constitutes an employee benefit plan, *id.* at 326, the Court held that the law authorizing the administrators of these benefit plans to pay plan beneficiaries lower wages does not "relate to" such a plan, *id.* at 334. It justified this decision by distinguishing non-preempted state statutes that "alter the incentives facing ERISA plans" from preempted laws that "dictate the choices" of ERISA plan administrators. *Id.* at 334.

The principle that preemption does not reach economic incentive programs applies here, since the fleet purchase rules change the incentives vehicle manufacturers face, rather than dictate their vehicle production choices. Just as laws altering the economic incentives influencing ERISA plan administrators do not "relate to" ERISA plans, fleet purchase requirements are not "standards relating to" control of new vehicle emissions. Since the Act specifically encouraged economic incentives in general and fleet purchase programs in particular, *see* 42 U.S.C. § 7511a(c)(4),

the Act does not protect vehicle manufacturers from rules increasing local demand for clean vehicles. Congress provided for preemption of vehicle emission standards in section 209, not local economic incentive programs.

## CONCLUSION

The Act preserves the authority to use local procurement as a source of economic incentives for clean air. These rules are requirements related to the purchase of vehicles, not standards related to the control of new vehicle emissions. The public health amici ask the Court to affirm the court of appeals ruling upholding SCAQMD's fleet purchase requirements.

Respectfully submitted,

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